

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

ORIGINAL

77-2003

United States Court of Appeals

For the Second Circuit.

JACK NATHAN,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK.

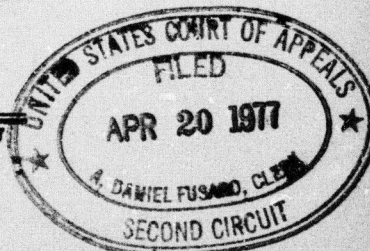
APPENDIX.

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(1430)



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1a

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

-----X

JACK NATHAN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

-----X

DOCKET ENTRIES.

Date	Proceedings
1974	
4/11	Filed indictment.
4/22	Case adjourned to 5/6/74. Pierce, J.
4/6	Def. (atty. present) Deft. pleads not guilty. Motions returnable in 10 days. Deft. ordered photographed and fingerprinted. Deft. is released on his own recognizance. Case assigned to Judge Bonsal for all purposes. Bauman, J.
5/7	Filed notice of appearance by atty: Louis Bender 225 B'way, NYC 227-6000.
7/3	Filed Govt.'s notice of readiness for trial.
1975	
1/20	Filed deft.'s notice of motion re: dismissal, etc.

DOCKET ENTRIES

Date	Proceedings
1/20	Filed deft.'s memo. of law in support of motion to dismiss, etc.
9/22	Filed Govt.'s affdvt. re: opposition to deft.'s motion for dismissal, etc.
9/30	Filed Govt.'s bill of particulars.
10/1	Jury trial begun before Judge Bonsal (count 9 & 10 dismissed) Consolidated for trial with 75 Cr. 949. Bonsal, J.
10/2	Trial cont'd.
10/3	Trial cont'd.
10/7	Trial cont'd. Deft. moves to dismiss - granted as to cts 7 & 8. denied as to cts. 1,2,3,4,5,6.
10/8	Trial cont'd.
10/9	Trial cont'd. Jury finds deft. guilty on counts 1,2,3 & 4.
10/10	Trial cont'd jury unable to reach verdict on remaining counts. 12/1/75 Set for sentence. Deft. R.O.R.Pre-sentence report ordered. Bon sal, J.
11/6	Filed transcript of record of proceedings dated Oct. 1,2,3,7,8,9,10,1975.
11/13	Filed deft's motion for an extension of time in which to file post-trial.
11/14	Filed deft.'s motion for an extension of time in which to file post-trial motions.
11/14	Filed memo-ent. on motion docketed this date. Extension of time granted to 11/24/75. Bonsal, J. m/n
11/24	Filed deft.'s notice of motion re: judgment of acquittal notwithstanding the jury verdict or, alternatively, for a new trial.
11/24	Filed deft.'s memo. of law re: support of motion for judgment of acquittal, etc.

DOCKET ENTRIES

Date	Proceedings
12/4	Filed Govt. memo. in opposition to deft.'s post-trial motions.
12/9	Filed deft.'s requests to charge.
12/9	Filed Govt.'s request to charge.
12/8	Filed JUDGMENT(atty. present 9 mons. impr. on ea. of cts. 1,2,3 & 4, to run conc. with each other. AND-FINED \$10,000. on each of cts 1,2,3,& 4. TOTAL FINE of \$40,000. is to be pd. or deft. is to stand committed until the fine is paid or he is otherwise discharged according to law. Deft. cont'd. own recognizance. Cts. 5 & 6 dismissed Bonsal, J. issued all copies.
12/12	Filed deft.'s notice of appeal from judgment of 12/8/75.' mailed copies to U.S. Atty & deft.
12/17	Filed Govt.'s request to charge.
12/17	Filed Govt 's memo of law.
12/17	Filed Govt 's memo of law re' support of admissibility of testimony concerning the submission of altered documents to I.R.S.
12/17	Filed proposed questions for the voir dire on behalf of Jack Nathan.
12/17	Filed deft. Jack Nathan's waiver of speedy trial.
12/22	Filed deft. J. Nathan's motion for stay of fine pending appeal.
12/31	Filed transcript of Record of Proceedings Dec 8/75.
12/30	Filed notice that the record on appeal has been certified and transmitted to the U.S.C.A. 12/30/75.
12/31	Filed notice that the suppl. record on appeal has been certified and transmitted to the U.S.C.A.
1976	
1/16	Filed notice of transmission to U.S.C.A. of 1st Suppl. Record.

DOCKET ENTRIES

Date	Proceedings
2/9	Filed deft. Jack Nathan's motion for stay of sentence pending appeal.
2/9	Filed memo-end. on deft. J. Nathan's motion for stay-granted. Bonsal, J. mn
8/17	Filed true copy of order from U.S.A.C. with opinion attached, affirming Judgement of District Court. S.D.N.Y. mn
20/7	Jack Nathan-bench warrant issued.
11/29	Filed true copy of order of the Supreme Court of the U.S. that the petition for a writ of certiorari to the U.S.C.A. 2nd Circuit is denied. Clerk m/n
12/22	Jack Nathan-filed J&C and marshal's return, deft. delivered to: MC.C. N.Y.C. 11/10/76.
1977	
1/21	Filed deft's notice of motion for reduction of sentence pursuant to Rule 35 of Title 18, FRCP ret. 02/07/77, 9:30 A.M., Rm. 518.
2/8	Filed deft' memo end. on motion to reduce sentence is denied, Bonsal, J. m/n
2/3	Filed Govt's affdvt in opposition to deft's Rule 35 motion.

EXCERPTS FROM TRIAL TRANSCRIPT

1 hph 74

2 so many of us here and do be here very promptly at 10,
3 or even a few minutes before and you come back to the
4 jury room. I hope you have a very nice evening.

5 (Jury left.)

6 THE COURT: May I see counsel in the robing room
7 for a minute.

8 (In the robing room.)

9 THE COURT: I thought this might be a good time
10 to get into this problem which the government has raised.

11 I understand there is some witness.

12 Who is this witness?

13 MR. WOHL: Mr. Katzman, Joseph Katzman, your
14 Honor.

15 THE COURT: And you don't know whether you are
16 going to call him or not but you may want to call him on
17 rebuttal and as I understand it, is it?

18 MR. BENDER: Who was at some time an attorney
19 for Mr. Katzman.

20 MR. WOHL: That's right.

21 THE COURT: And the question is whether there
22 is a conflict of interest here, should he testify, is that
23 right?

24 MR. WOHL: I think that it is just a question.
25 as Mr. Bender explain: it to me, making sure that Mr. Nathan

EXCERPTS FROM TRIAL TRANSCRIPT

1 hph75

2 understands that and is agreeing to waive--

3 THE COURT: If, assuming, it happens.

4 MR. WOHL: That's right.

5 THE COURT: Poor Mr. Nathan, he has to rely
6 on Mr. Bender. Do you have any problem with this, Mr. Nathan?

7 THE DEFENDANT: No, your Honor.

8 THE COURT: None at all?

9 THE DEFENDANT: None whatsoever.

10 THE COURT: If the government says, if this
11 gentleman, Mr. Katzman should testify, as far as any privilege
12 that might exist between you and Mr. Katzman, you waive that?

13 MR. BENDER: Judge, that's not the question.
14 The question is not privilege.

15 THE COURT: What is it?

16 MR. BENDER: There are two problems. One is,
17 Mr. Nathan's right under the Sixth Amendment to counsel. The
18 second problem that you face as a result of that Sixth
19 Amendment, is my representation of Joseph Katzman, which
20 antedates my being retained by Mr. Nathan, in a totally
21 unrelated matter.

22 Now, if Mr. Katzman testifies as a witness,
23 obviously, I can't disclose any confidential communication
24 given to me by Mr. Katzman, but at the same time, Mr. Nathan
25 is entitled to my complete loyalty and I am placed in a

EXCERPTS FROM TRIAL TRANSCRIPT

1 hph76

2 position where he could very well feel that my representing
3 Katzman in a different case, he is getting divided loyalty,
4 so to speak.

5 I have explained this to Mr. Nathan, and Mr.
6 Wohl said he doesn't know whether he will call him, at
7 the present time he has no intention of calling him but
8 he may call him at rebuttal.

9 To overcome that problem, Mr. Nathan is willing
10 either to permit, which I prefer, Judge Baltimore to cross-
11 examine --

12 THE COURT: I would prefer that too. I think
13 that would make a lot of sense. You have never had Mr.
14 Katzman.

15 MR. BALTIMORE: No, I have not.

16 THE COURT: I think that makes a lot of sense.

17 MR. BENDER: And yet at the same time, I think
18 for Mr. Nathan's protection and for all concerned, since
19 this Fifth Circuit Court case, United States v. Garcia, which
20 I gave Mr. Wohl and Mr. Rankin, the Fifth Circuit holds
21 in a different situation, holds that the defendant has his
22 Sixth Amendment rights under these circumstances, I felt
23 Mr. Nathan should do this under the circumstances so that
24 I am not criticized by your former Bar Association which
25 you were the head of and my American Bar Association, the

EXCERPTS FROM TRIAL TRANSCRIPT

1 hph 77

2 Circuit Court of Appeals, if there is an conviction.

3 THE COURT: Mr. Nathan, is this clear to you,
4 talking about the Sixth Amendment, right to counsel?

5 THE DEFENDANT: Your Honor, I have complete
6 confidence in Mr. Bender and Judge Baltimore. Whatever
7 they do, I am one hundred percent in accord.

8 THE COURT: And if they say to you in doing this
9 you might be waiving the Sixth Amendment privileges,
10 is that agreeable to you?

11 THE DEFENDANT: I will do anything they say, your
12 Honor.

13 THE COURT: The only thing, tell Mr. Katzman
14 not to talk to Judge Baltimore. Will you warn him about
15 that, the government?

16 MR. BENDER: I have spoken to Mr. Katzman yesterday
17 and told him I was disclosing the question and I asked him
18 if he has any objection to my still representing Mr. Nathan
19 under these circumstances, and he said absolutely none.
20 But, I think we should get from Mr. Nathan, with all due
21 respect to Mr. Nathan's answers, I think we should get
22 from Mr. Nathan an expressed statement, not that he is follow-
23 Judge Baltimore and me blindly, but that he understands
24 the situation, that he agrees that he wants me--

25 THE COURT: Now you see what lawyers are like, Mr.

EXCERPTS FROM TRIAL TRANSCRIPT

1 hph 78

2 Nathan. I think that is a point. You do understand the
3 situation.

4 THE DEFENDANT: Unfortunately I know lawyers
5 and I love them but I don't like accountants.

6 THE COURT: I can understand that too. But the
7 point is, totally apart from your reliance on Mr. Bender
8 and Mr. Baltimore, I want to ask you do you understand
9 the situation?

10 THE DEFENDANT: I do.

11 THE COURT: Regardless of your reliance on them
12 you do waive any right that you may have, is that correct?

13 THE DEFENDANT: Yes, your Honor.

14 MR. BALTIMORE: I want to ask for the record
15 try to keep referring to me as mister. If this record
16 should go to the Circuit Court I don't want my friend to
17 say anything. Try to keep it mister.

18 THE DEFENDANT: I know the judge for many years
19 and I keep calling him judge.

20 THE COURT: The point is, it is a question for
21 the jury. It is not necessarily that being a judge may help
22 you. It might even help you because there is so much of
23 judges. Let's keep it to Mr. Baltimore.

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: Thank you. Anything any of you can do
move this along I will help you.

(Adjourned on October 2, 1975, at 10 A.M.)

EXCERPTS FROM TRIAL TRANSCRIPT

1 rg:mg 2

Katz-redirect

2 THE COURT: You can answer that.

3 A Approximately seven or eight.

4 Q It is correct to say that in addition to the fees
5 that you told us about on cross-examination that you were
6 paid by Mr. Nathan's company, Nathan, Nathan & Nathan, you
7 were also paid by his other companies from time to time,
8 weren't you?

9 A No.

10 Q Never?

11 A Let me explain. The fee was the same. Sometimes
12 it was paid out of a different corporation, but the fee never
13 varied per month.

14 Q Did you maintain the books of any other corpora-
15 tions for Mr. Nathan besides Nathan, Nathan & Nathan?

16 A Yes.

17 Q What corporations?

18 MR. BENDER: Your Honor, I am going to object to
19 this.

20 THE COURT: I will let him answer that.

21 A Credit Card Association, Airlines Association,
22 Bocar Realty or Bank Realty and several inactive corpora-
23 tions.

24 Q Were you doing this work for the other corporations
25 for free?

EXCERPTS FROM TRIAL TRANSCRIPT

rg:mg 10

Katz-redirect

1
2 A Yes.

3 Q And he told you he had a receipt of some sort on
4 a mercantile or commodity or cotton exchange, or something
5 like that, isn't that right?

6 A Yes.

7 Q Do you remember what exchange it was?

8 A I think it is the produce exchange.

9 Q At the time that you were dealing with Mr. Nathan
10 you understood, did you not, that it would be improper to
11 declare on a tax return travel and entertainment expenses
12 that were not in truth and in fact incurred, isn't that
13 right?

14 A Excuse me? I don't understand the question.

15 THE COURT: Mr. Reporter, read the question again
16 and see if I understand it.

17 (Record read)

18 THE COURT: You can answer that question.

19 A You mean whether I discussed it with him or
20 whether I knew it?

21 THE COURT: No, it is a question of your knowledge
22 as an accountant.

23 A Yes, of course.

24 Q When you say that there were some guidelines about
25 certain percentages that you read square off average travel

EXHIBIT 1.
MEMORANDUM OF INTERVIEW

In re : JACK and EVELYN NATHAN
11-31-001-4-4
and
NATHAN, NATHAN AND NATHAN LTD.
11-31-002-4-4

Date : October 10, 1972

Time : 10:55 A.M. - 12:30 P.M.

Place : Intelligence Division
35 Tillary Street, Brooklyn, New York

Present: JACK NATHAN, Taxpayer
EVELYN NATHAN, Taxpayer's Wife
HARRY LUTZKY, C.P.A.
Revenue Agent ANDREW TSCHINKEL
Special Agent GEORGE W. NASS

At the onset of the interview, NATHAN was read his constitutional rights from NAR Form 120. He stated that he understood them.

NATHAN stated that he was born on November 3, 1911 and is married. They live in a house in Putnam Valley, New York approximately six months of the year and in their Forest Hills house the rest of the year. In addition to these two residences, NATHAN owns several lots of vacant land in Putnam County and a small lot with a boathouse on Lake Mahopac, New York. They have two boats, a rowboat and a small power boat. NATHAN stated that he did not receive any non-taxable income during the years 1968, 1969 and 1970 and that all his taxable income is reported on the amended returns he filed for 1969 and 1970.

Regarding NATHAN, NATHAN AND NATHAN LTD. (hereafter referred to as NNN), NATHAN stated that it was incorporated in 1960 and remained inactive at first, becoming active in about 1963. Prior to incorporating, he operated as a partnership. NATHAN stated that he also has a 100% interest in CREDIT CARD ASSOCIATION CORP., AIRLINES CREDIT ASSOCIATION CORP., BOKAL REALTY CORP. and ORBANK REALTY CORP. which are active and HOTEL CREDIT ASSOCIATION CORP. which is inactive.

NATHAN stated that NNN's business was collecting monies owed to its clients. NATHAN explained that he is allied with the AMERICAN HOTEL AND MOTEL ASSOCIATION and that his clients are referred to him by this association. NNN does not solicit any business. Its primary type of client is hotels and in the state of Nevada, some casinos also.

EXHIBIT 1

Memorandum of Interview

2

According to NATHAN, 99% of the money owed is mailed in. A receipt should be mailed to the sender but he stated it served no real purpose since the cancelled check is the debtor's receipt. NATHAN stated a debtor would get a receipt if he asked for one after he received final payment. NNN took in very little cash.

NATHAN stated that deposits are made up by the bookkeeper, BEATRICE GUZMAN CARRISQUILLO who also opens the mail. These monies are deposited into NNN'S account at either the FIRST NATIONAL CITY BANK or CHASE MANHATTAN BANK. The bulk of the deposits went into FIRST NATIONAL CITY BANK, as the CHASE account was opened recently. NATHAN stated that no money came through his hands.

His accountant during the period in question was SANFORD KATZ, a C.P.A., who came in once a week to write up the books. He stated that he relied on his accountant and expected him to handle everything. He could not recall who recommended him. However, NATHAN himself was the only one who was authorized to sign checks.

Prior to KATZ, NATHAN stated he had an accountant named EDWARDS who wanted to handle NATHAN'S investments also. NATHAN dismissed him after a short time.

NNN mailed its clients a check for the money it collected approximately once every thirty days. These checks are mailed out by the bookkeeper. In addition, NNN billed the clients for its share of monies collected which the debtors might have mailed directly to the client. Clients usually advise NNN of amounts collected directly.

If NNN is paid with a bad check, it resumes dunning the debtor. If the money was forwarded before the check bounced, NNN tried to get it back.

KATZ also wrote up the corporate payroll and mailed out the returns. He also wrote out his own check for his fee which NATHAN signed. The employees were paid by check and did not receive any commission.

NATHAN stated that he has an oral agreement with FIRST NATIONAL CITY BANK that they would never bounce any NNN check regardless of date. NATHAN contended that none of his accountants ever advised him that NNN had corporate checks outstanding for long periods of time, some for approximately ten years. He added that he believed that Revenue Agent KERR and KATZ had reached an agreement as to how to handle these checks, adjustment wise. NATHAN was informed that no such agreement was made.

NATHAN stated that no NNN checks were ever post or pre-dated.

EXHIBIT 1

Memorandum of Interview

3

NATHAN stated that an accountant named DUNST set up NNN as a Subchapter S Corporation (Form 1120S), without ever telling him, adding that he was not familiar with the distinctions between filing a Form 1120 and Form 1120S.

NNN has corporate minutes but he is not sure what they contain.

When questioned as to KATZ' statements to us in an interview dated October 3, 1972 that he never knew of any changes in the stock ownerships of NNN, NATHAN stated that KATZ knew that NATHAN'S wife had purchased 50 shares of stock in early 1969 although he could not state how KATZ allegedly knew of it. Furthermore, neither NATHAN nor his wife could remember how much she paid for her shares of stock. NATHAN stated it would be in the stock book.

In reply to questions as to why the corporate income tax returns of NNN were late filed, he stated that he never realized the 1120's had not been filed. KATZ gave him monthly figures and he assumed everything was all right.

Concerning income that was omitted on NATHAN'S originally filed Forms 1040 but which was picked up on the amended returns, NATHAN stated that he left all Form 1099's he got in an office cabinet for KATZ to pick up. KATZ allegedly took work out of NNN's office without permission and apparently lost some items.

Regarding \$14,563.51 in bond interest which was picked up on NATHAN'S amended Form 1040 for 1969, he stated that he gave KATZ the tape he got from the bank at the time he cashed the bonds. This was the only record he had. According to NATHAN, the bonds were U.S. Savings Bonds "E" series, in the name of JACK NATHAN or GERTRUDE NATHAN, his sister. These bonds were all purchased during World War II. NATHAN recalled taking them to MR. COSTELLO, Manager of the CHASE MANHATTAN BANK across the street from NNN's office. NATHAN, however, could not explain how come all the interest was picked up on his return if the bonds were partly owned by his sister. Also, since the entire deposit of \$14,563.51 was reported as interest, he could not explain where the principal was deposited. NATHAN also stated that he has never kept a record of all his savings accounts and does not have a checking account. He buys money orders through various banks when it is necessary to pay by other than cash.

NATHAN stated that he buys vacant land for investment but he has not yet sold any, particularly during the years 1968 through 1970.

NATHAN explained that BOKAL REALTY CORP. was a corporation of his which owned the building and property at 112 W. 17th Street and 438-440 W. 45th Street, New York, N.Y. ORBANK REALTY CORPORATION owned only 167 3rd Avenue, New York, N.Y. where NNN is located.

EXHIBIT 1

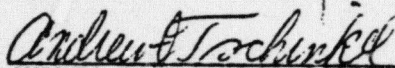
Memorandum of Interview

4

CREDIT CARD ASSOCIATION, INC. collected on credit cards other than hotels such as CARTE BLANCHE. AIRLINES CREDIT ASSOCIATION, INC. handles airlines accounts.

NATHAN denied knowing that KATZ had told Revenue Agent KERR that the only related corporation was ORBANK REALTY CORPORATION. He could not explain why the names of four related corporations were gone from his buildings directory the day after Revenue Agent KERR asked about other corporations. NATHAN only stated that it could have been done by vandals who were always breaking the directory glass.

It was agreed that a meeting would be arranged at NNN's offices to inspect the books and records for the years under investigation.



ANDREW TSCHINKEL
Revenue Agent



GEORGE W. NASSE
Special Agent

NOTICE OF MOTION TO VACATE JUDGMENT AND EXTEND BAIL.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -x	
JACK NATHAN,	: 76 Civ.
	: D.B.B., U.S.D.J.
Plaintiff-Petitioner,	: (original case no. 74 CR 377)
- against -	: NOTICE OF MOTION TO VACATE
UNITED STATES OF AMERICA,	: JUDGMENT AND TO EXTEND
	: PURSUANT TO 28 U.S.C. § 22
Defendant.	: AND FOR OTHER INCIDENTAL
	: <u>RELIEF</u>
----- -x	

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of Steven Thal, Esq., counsel for plaintiff-petitioner, sworn to October 6, 1976, the annexed supporting affidavits, exhibits and memorandum of law and all of the papers previously filed in United States v. Nathan, 74 CR 377, plaintiff-petitioner, now released on his own recognizance and having been ordered to surrender on October 12, 1976 pursuant to an unlawfully imposed federal judgment and sentence, will move this Court on October 7, 1976, before the Honorable Dudley B. Bonsal, United States Courthouse, Foley Square, New York, New York, for an order:

- 1) granting plaintiff-petitioner a plenary evidentiary hearing;
- 2) granting rights of limited discovery;
- 3) extending bail;
- 4) vacating the judgment and sentence pursuant to 28 U.S.C. § 2255;

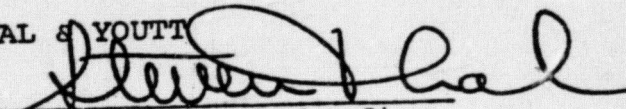
NOTICE OF MOTION TO VACATE JUDGMENT AND EXTEND BAIL

and for such other and further relief as to this Court may seem
just and proper.

Dated: New York, New York
October 7, 1976

Yours, etc.,

THAL & YOUTT

By 

A member of the firm

919 Third Avenue
New York, New York 10022
(212) 751-3300

Nathan Lewin, Esq.,
MILLER, CASSIDY, LARROCA & LEWIN
2555 M. Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Attorneys for Plaintiff-Petitioner

TO:

Frank Wohl, Esq.
United States Attorney
Southern District of New York
1 St. Andrews Plaza
New York, New York 10002

AFFIDAVIT OF STEVEN THAL IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x	:	
JACK NATHAN,	:	76 Civ.
	:	D.B.B., U.S.D.J.
Plaintiff-Petitioner,	:	(original case no. 74 CR 377)
	:	
- against -	:	AFFIDAVIT IN SUPPORT OF
	:	MOTION TO VACATE JUDGMENT
UNITED STATES OF AMERICA,	:	AND TO EXTEND BAIL PURSUANT
	:	TO 28 U.S.C. § 2255 AND FOR
Defendant.	:	<u>OTHER INCIDENTAL RELIEF</u>
	:	
-----x		

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

STEVEN THAL, an attorney admitted to practice in the State of New York and in the United States District Court for the Southern District of New York, being sworn, deposes and says:

1. I am a partner in the law firm of Thal & Youtt, attorneys for defendant Jack Nathan herein.
2. Defendant was found guilty, after a trial by jury in this Court, on four of ten counts of federal income tax evasion in violation of 26 U.S.C. § 7201. Defendant was sentenced to nine months incarceration on each count (running concurrently) and fined \$40,000. Judgment was entered on December 8, 1975.
3. Mr. Nathan's conviction was affirmed on June 16, 1976, and a petition for rehearing was denied on August 6, 1976. Thereafter, on August 13, 1976, a petition for a writ of certiorari from the Supreme Court was timely filed, and said petition is presently still pending.

AFFIDAVIT OF STEVEN THAL IN SUPPORT OF MOTION

4. Mr. Nathan is scheduled to surrender for incarceration on October 12, 1976.

5. I have only recently been retained to act as co-counsel for Mr. Nathan in conjunction with his continued representation by Nathan Lewin, Esq., of the law firm of Miller, Cassidy, Larroca & Lewin in Washington, D.C. Mr. Lewin has represented Mr. Nathan as appellate counsel, since the time of conviction.

6. During the course of the appeals in this matter Mr. Nathan's continued and vehement protestations of innocence caused Mr. Lewin substantial concern. Therefore, Mr. Lewin suggested that Mr. Nathan take a polygraph examination on the central issues of the trial. Mr. Nathan readily agreed and such an examination was made by a reputable expert in the field. That examination resulted in a report which opined that Mr. Nathan did NOT wilfully evade income taxes either by carrying uncollected checks on his company's books or by misallocating checks which he cashed at various hotels (both of which theories were the essence of the Government's case). In addition, the polygraph indicated that Mr. Nathan had NO knowledge of wrongdoing by his accountant - Sanford Katz - who admitted at trial that he had been solely responsible for preparing Mr. Nathan's books and tax returns* [Polygraph result annexed hereto as Exhibit 1.] Mr. Nathan also advised Mr. Lewin that he was prepared to take additional polygraph tests administered by the Government if that would help establish his innocence.

* Mr. Katz testified at length during the trial as a Government witness and admitted that he alone had been responsible for the errors in the company books and in the tax returns.

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7. With this information in hand, Mr. Lewin met with various members of the United States Attorneys' Office while the appeal was pending, to discuss Mr. Nathan's adamant protestations of innocence, the polygraph results and to determine whether and where in the course of the trial there could have been a miscarriage of justice. At that time there was yet nothing really definitive known to counsel which could be to be the cause of an incorrect verdict. The Government remained unpersuaded of any injustice at the end of the aforesaid meeting.

8. Despite his unsuccessful approaches to the United States Attorneys' Office, Mr. Lewin continued his various efforts to find out what, if anything, could have yielded an incorrect verdict. Included amongst these efforts was his decision to have Mr. Nathan retain independent counsel to make a thorough review of the record and to undertake collateral investigations in connection therewith. That was the purpose for which my firm was retained.

9. The most unusual aspect of the trial record was the absence of any witnesses including the defendant, on behalf of the defense. Based upon certain inquiries made by Mr. Lewin and myself, it seemed clear that there was a very substantial defense case which had simply never been presented to the jury. In depth interviews with Mr. Nathan and other participants at the trial made it clear that witnesses who were ready and able to testify (and who could have contributed a great deal to the defense) were never called. Our view of the importance of presenting

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a defense case was buttressed by our evaluation that the prosecution's evidence had been weak and that there had been large gaps in the Government's case which were never exploited.

10. Certainly, the failure to summon witnesses, as a simple function of trial strategy can rarely, if ever, be questioned at this stage of the proceedings. We do not purport to do so here. However, what our investigation has demonstrated is the very startling revelation that the failure to present a defense has been elevated from the level of a strategy disagreement to one involving a possible miscarriage of justice of constitutional dimensions.

11. Defense counsel at trial had a conflict of interest between two clients which completely immobilized him (perhaps without his knowledge) when it came to presenting a defense case. The attorney - Louis Bender, Esq. - represented Mr. Nathan in the instant case and one of Mr. Nathan's accountants (Joseph Katzman) in another criminal investigation by the I.R.S. The complexity of the inter-relationship between these two clients and their two separate cases may have escaped Mr. Bender but it nevertheless must have had a very substantial impact on the decisions he made during the course of Mr. Nathan's trial as well as in pre-trial preparation.*

* I wish to emphasize here that Mr. Bender may not have realized the full scope of the conflict and that no allegation whatsoever is being made that he acted intentionally to deprive Mr. Nathan of his rights. I have attempted, where possible, to set this forth in the body of my affidavit but additionally wish to make it clear at the onset.

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12. What may have misled Mr. Bender and the Court (as it certainly misled Mr. Nathan and subsequent counsel who reviewed the record) was that while the problem hardly surfaced at the trial, its influence was all pervasive. Specifically, the conflict of interest affected FIVE strategic areas:

1. the possibility of Mr. Katzman's testifying as a Government witness, subject to cross-examination by Mr. Bender;
2. the possibility of Mr. Katzman testifying as a defense witness;
3. the possibility of defendant taking the stand and incriminating Mr. Katzman during his testimony;
4. the possibility of Mr. Bender effectively cross-examining Mr. Katz who may have testified unfavorably against Mr. Katzman's activities;
5. the possibility of additional defense witnesses taking the stand who may also have testified unfavorably against Mr. Katzman's activities.

As will be seen, the first of these five possibilities was dealt with on the record at the trial. But the other four were not. Ironically, as will also be seen, it may be that the apparent resolution of the first conflict area lulled all concerned into a false sense of security which prevented a critical confrontation with the other conflict areas.

13. At the close of the first day of the trial, a discussion between the Court and all counsel was held regarding Mr. Bender's inability to cross-examine a potential Government

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rebuttal witness - Joseph Katzman. The substance of that conference was that Mr. Bender had represented Mr. Katzman on another matter prior to and during the period he represented Mr. Nathan and that he felt he could not properly cross-examine Mr. Katzman, if that became necessary. Mr. Bender felt "If Mr. Katzman testifies as a witness, obviously I can't disclose any confidential communication given to me by Mr. Katzman." Trial transcript p. 176. The situation was explained to Mr. Nathan and everyone agreed that the problem would be resolved if Mr. Baltimore undertook cross-examination. Since Mr. Katzman was never called as a rebuttal witness the problem appeared to have resolved itself and was soon forgotten. (Copies of transcript pages 173-177 are annexed hereto as Exhibit 2).

14. The problem did not come back into focus again until recently when we learned certain new facts which, when pieced together with what we already knew, made us aware of the full scope of the conflict. Even Mr. Bender was probably never aware of the full problem until we discussed it with him recently.

15. The facts surrounding the conflict, as we now understand them, seem to be as follows. In about November, 1971, during the course of the regular I.R.S. audit of Mr. Nathan, he decided to retain a new C.P.A. to assist Sanford Katz. The new accountant happened to be Joseph Katzman. Mr. Katzman became the key man in representing Mr. Nathan with the I.R.S. He discovered the failure of Sanford Katz to keep Mr. Nathan's books and tax returns up-to-date. He was also

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responsible for having everything brought current and for negotiating a settlement with the I.R.S. on Mr. Nathan's behalf. (See Affidavit, Exhibit 3). Sometime during this period, Mr. Katzman became involved in a separate I.R.S. criminal investigation involving himself and one or more other persons - all unrelated to Mr. Nathan's case. Mr. Katzman did not disclose his personal problems to Mr. Nathan. Mr. Katzman did, however, retain counsel to represent him in his own matter. That counsel was Louis Bender. When the intelligence division entered Mr. Nathan's case, Mr. Katzman indicated his desire to withdraw as Mr. Nathan's accountant. In hindsight it is now very clear as to why Mr. Katzman desired to step out of the picture. Mr. Nathan was always puzzled by this action but never understood the reason why. He has, for example, told me that he was never advised by Mr. Katzman that Special Agents had begun an investigation and that he accidentally found out from his bank that they received a subpoena. Mr. Nathan also told me that he later called Mr. Katzman to ask him why Mr. Katzman did not notify him of the transfer of his case from regular auditors to Special Agents. Mr. Katzman apparently gave no real answer and just expressed his desire to withdraw. Mr. Nathan then retained Mr. Ted Mate as his accountant to deal with the I.R.S.

16. On May 11, 1973, Mr. Katzman gave a sworn statement to I.R.S. Special Agents regarding his association with Mr. Nathan. We do not know presently whether he was already represented by Mr. Bender at this time. (copy annexed as Exhibit 4)

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17. Sometime in mid-1974, Mr. Nathan retained Mr. Bender as his counsel. At the very outset Mr. Nathan advised Mr. Bender that he believed Mr. Katzman would be a key witness on his behalf since he had first-hand knowledge of the wrongdoings of Sanford Katz. Mr. Bender did not mention anything regarding his representation of Mr. Katzman, which was still continuing. (See Nathan Affidavit, Exhibit 3) While Mr. Bender has advised both Mr. Nathan and Mr. Lewin that he represented both men at the same time, he has stated that he did not realize it was the same Joseph Katzman until he contacted Mr. Katzman to interview him regarding Mr. Nathan. Apparently when they met, face to face, Mr. Bender did make the connection. Neither Mr. Bender nor Mr. Katzman advised Mr. Nathan of the dual representation when it first became apparent to them.

18. Throughout the period that Mr. Bender was representing both Messrs. Nathan and Katzman he was hearing Mr. Nathan's version of the facts and also Katzman's somewhat different version - as supplied to the I.R.S. previously. Mr. Bender has advised Mr. Lewin that while he originally accepted Mr. Nathan's version of Katzman's role, and did say he thought Katzman would be a good witness, he changed his mind after reading Katzman's I.R.S. statement and after interviewing him. Although perhaps unintentionally, it is clear that Mr. Bender did not disclose to Mr. Nathan that he no longer believed Mr. Nathan's version of the facts, that he now believed

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Mr. Katzman's version, that he may have been concerned about Katzman's statement to the I.R.S. AND that he did not believe Katzman would be a helpful witness any longer.

19. During the course of this dual representation, Mr. Bender also learned from Mr. Katzman (which was also contained in the sworn I.R.S. statement) that Mr. Katzman had incriminated Mr. Nathan as to a scheme to backdate some corporate documents and thereby commit another and different tax fraud, involving a Subchapter S corporation. Mr. Bender again (probably without realizing it) believed what he heard from Mr. Katzman and again he did not disclose this information to Mr. Nathan. All of this occurred despite the fact that Mr. Nathan at the same time persisted in telling Mr. Bender that he wanted Mr. Katzman as a witness. He also told Mr. Bender that Mr. Katzman had suggested to Mr. Nathan that he backdate the corporate documents. (See Nathan Affidavit, Exhibit 3.)

20. Finally, as the day of trial approached (as best we can presently determine, it was the day before the trial) Mr. Bender told Mr. Nathan and Mr. Baltimore (who was only partially involved in the trial) in general terms that he represented Mr. Katzman but claimed he could not go into details because of the attorney-client privilege. Both Mr. Nathan and Mr. Baltimore understood from this conversation that Mr. Bender represented a client of Mr. Katzman and that Mr. Katzman was only collaterally involved. (See Nathan Affidavit, Exhibit 3 and Baltimore Affidavit, Exhibit 5.) It is, however,

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clear that Mr. Bender did not disclose that Mr. Katzman was involved in a criminal case, nor that Mr. Katzman had turned Mr. Bender away from his primary duty to Mr. Nathan by diverting his trust and faith in Mr. Nathan's statements and positions. Mr. Bender also did not disclose that, intentionally or not, he had already made up his mind not to call either Mr. Nathan or Mr. Katzman to the stand since they each would make incriminating statements about the other.

21. The foregoing interplay between the two clients and their two cases - as acted out on their one attorney - set the stage for Mr. Nathan's trial and the defense which could not be put on.

22. The die was already cast on the first day of the trial. Mr. Bender has advised Mr. Lewin that he still contemplated putting Mr. Nathan on the stand at that time. Mr. Bender must have learned that the Government had brought Mr. Katzman to court and expected to call him as a rebuttal witness if Mr. Nathan took the stand, and therefore he changed his mind. The in-chambers conference on the first day of trial referred to in ¶13 supra, (Exhibit 2) clearly reflects the rebuttal nature of Mr. Katzman's testimony. Neither Mr. Nathan nor Mr. Baltimore understood the real nature of the problem raised at this conference. (See Nathan Affidavit, Exhibit 3 and Baltimore Affidavit, Exhibit 5.)

23. At the trial, Mr. Nathan kept asserting that he wanted to take the witness stand on his own behalf. Mr. Bender kept him from doing so. (See Nathan Affidavit, Exhibit 3 and

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exhibits thereto and Baltimore Affidavit, Exhibit 5.) The significance and veracity of Mr. Nathan's contention is reinforced by the fact that Mr. Nathan voluntarily appeared before Assistant United States Attorney Putzel (without counsel) and before the Grand Jury investigating his case, and on both occasions fully and completely set forth his position. Even the Court expected Mr. Nathan to take the stand in a case such as this. "The defendant is going to testify in his defense, I take it?" (Transcript, p.429, Exhibit 6.)

24. Why then did he not testify at the trial?

Mr. Bender advised Mr. Lewin that he was afraid to put Mr. Nathan on the stand because of the affidavit supplied to the Government by Mr. Katzman. In this affidavit, Mr. Katzman stated that Mr. Nathan requested a change in the 1969 corporate tax return from an 1120S return to an 1120 (which would result in a substantial tax savings).* Mr. Katzman stated that although

* Mr. Nathan's corporation had always been a Subchapter S Corporation, with him as sole stockholder. While Mr. Katzman was supervising the preparation of the delinquent 1969 tax return, it appeared that the filing of a regular return (form 1120) rather than the Subchapter S return (form 1120S) would save Mr. Nathan a substantial amount of money. Someone apparently devised the idea that if stock had been sold or given to a new shareholder during the year 1969 [and no consent to continuation of Subchapter S treatment having been filed within 30 days] then the corporation would have automatically lost its Subchapter S status and the use of a regular 1120 return would be correct. The question then was who had devised this idea and who had suggested the backdating of corporate documents to reflect a gift or sale of shares.

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he never saw the documents to support this change in status, Nathan assured him they existed. Presumably Mr. Bender was concerned that the documents did not exist and that Mr. Nathan would be vulnerable on cross-examination, or if Mr. Katzman were called by the Government as a rebuttal witness.

25. According to Mr. Nathan (See Nathan Affidavit) he always assured Mr. Bender that it was Katzman who had suggested the change from an 1120S to an 1120 filing and that Mr. Katzman had told Nathan to see his lawyer (now deceased) about preparing some papers and backdating them. Mr. Bender has confirmed to Mr. Lewin that this was the explanation given to him by Nathan.

26. What one has here is an attorney with two clients telling diametrically opposite stories and each incriminating the other in a criminal fraud. Perhaps without realizing what was happening, Mr. Bender resolved this conflict by keeping both clients from taking the stand.

27. In addition, Mr. Bender was already influenced before the trial by the story told by Mr. Katzman. Normally an attorney must begin with a presumption and belief that his client is telling the truth. The duty of an attorney is then to seek verification and support for his client's version of the facts. In this case, Mr. Bender heard Mr. Nathan's story and then saw Mr. Katzman's I.R.S. affidavit and owed the same duty to both.* How could he seek to verify and support

* Mr. Bender refers to the problem of divided loyalties in the conference with the Court set forth in Exhibit 2 but at no time did he explain to Mr. Nathan that he had divided loyalties as to the whole defense case.

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these two conflicting stories before trial in order to decide whether to put Mr. Nathan on the stand and discredit Mr. Katzman?

28. Mr. Nathan's waiver of his right to take the stand was never put into the trial transcript nor did he sign any waiver of this right. This certainly leads one to question how voluntary this waiver was or whether it was done under pressure of his counsel.

29. Mr. Bender was in a bind even if he just put Mr. Nathan on the stand and allowed the Government to cross-examine him on the Subchapter S problem. If Mr. Nathan incriminated Mr. Katzman, then Mr. Bender would have violated his duty of undivided loyalty to Mr. Katzman by allowing incriminating evidence against him to come out.

30. Turning now to the other side of the coin, one finds a similar problem in reverse. Throughout the pre-trial stage of the case, Mr. Nathan insisted to Mr. Bender that Joseph Katzman was going to be a key witness for him. Even during the trial Nathan kept telling Bender he wanted Katzman called; (See Nathan Affidavit, Exhibit 3 and Baltimore Affidavit, Exhibit 5.) This is independently verified by the relevant entries in Nathan's trial notebook (See Exhibit to Nathan Affidavit). Obviously Mr. Katzman was never called as a defense witness. We need not speculate too much as to why Mr. Katzman was not called. First, the Government would presumably have cross-examined him on his involvement in the "unrelated" criminal tax fraud investigation. This would be a very uncomfortable

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position for Mr. Bender. His client would be giving sworn testimony to the Government on a pending investigation. Second, his testimony would create a public record of something which Mr. Bender had been trying to settle informally (and eventually he did settle Mr. Katzman's problems without judicial proceedings and without any negative consequences to him). Mr. Katzman advised Mr. Nathan in a recent telephone call of the satisfactory outcome of his problem. (See Nathan Affidavit, Exhibit 3.) Third, if Katzman had begun to testify to the subchapter S problem on cross-examination by the Government, Mr. Bender would have had little choice but to call Mr. Nathan at least to rebut this. Then the door would have been opened as to the two incriminating contradictory statements on the record by both clients.

31. The reason that Mr. Nathan kept insisting before and during the trial that Mr. Katzman should be called as a witness is very simple. When Nathan became aware that Sandy Katz was not properly handling the I.R.S. audit he felt he needed to call in a more experienced accountant - Joseph Katzman. When Mr. Katzman came in to assist Sanford Katz, he discovered that Sanford Katz had fallen years behind in keeping the books and in filing tax returns. Sanford Katz admitted his failings to Mr. Katzman and Mr. Katzman prepared the first affidavit for Sanford Katz to sign in which Sanford Katz took the blame and exculpated Mr. Nathan (See Katz Affidavit annexed as Exhibit 7). It was also Mr. Katzman who dissuaded Mr. Nathan from filing criminal

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charges against Sanford Katz after it was learned that Sanford Katz had not done any work for years while taking his regular fees. It was also Mr. Katzman who advised various other Governmental authorities of Mr. Nathan's innocence in failing to file timely tax returns and who put the blame on Sanford Katz for these failures. (See Katzman letters annexed hereto as Exhibits 8, 9, 10 and 11.) Finally, and probably most significantly, it was Mr. Katzman who proposed and arranged the method by which Sanford Katz's failure to properly prepare prior returns was to be remedied. Mr. Katzman decided that 1964 stale checks would be returned to income in the 1969 return, 1965 stale checks would be picked up as income in 1970, etc. This was done for each year up to 1967. No adjustments were made for 1967 and later years, since five years had not expired. No criminal charges were based upon any of the years written off in this manner, but unnegotiated checks issued in 1967 and later became part of the charge of tax evasion. Sanford Katz testified at the trial that this was Mr. Katzman's proposal and that he, Sanford Katz, wanted to write off all checks after 12 months on the tax return for that year or the next (transcript p. 382-383 annexed as Exhibit 12). All of these areas would have been extremely helpful to Mr. Nathan if they had been brought out in the defense case by having Mr. Katzman on the stand.

32. I have interviewed another potential defense witness who advised me that he was available and willing to take the witness stand. This was Mr. Ted Mate. He was also a C.P.A. who had been hired by Mr. Nathan when the regular audit was

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referred to the intelligence division of the I.R.S., and after Mr. Katzman retired from the engagement. Mr. Mate was prepared to testify regarding the system devised by Mr. Katzman to write off stale checks. He also asked Mr. Nathan before the indictment why there had been a change from the 1120S to the 1120 filing for 1969 and Mr. Nathan told him that this change was Mr. Katzman's idea. Thus, Mr. Mate would have been another witness who would have been able to testify in Mr. Nathan's favor while also discrediting Mr. Katzman - and certainly Mr. Katzman's version of the Subchapter S incident.

33. In addition to his testimony regarding Mr. Katzman, Mr. Mate had drawn certain conclusions from his review of Mr. Nathan's books which are consistent with Mr. Nathan's version of the facts. For one thing, Mr. Mate concluded that the volume of stale checks increased substantially after Sanford Katz took over the accounting work. Up until then, there were apparently only very few outstanding stale checks. He also would have testified to numerous other errors in bookkeeping and bank reconciliations which had been made by Sanford Katz but which were unrelated to the charges in the indictment (some of which worked against Mr. Nathan and cost him money). This would, at least in part, confirm the defense theory of the case that the blame for the incorrect tax returns was solely on Sanford Katz. At all times, Mr. Nathan wanted Mr. Mate called as a witness. (See Nathan Affidavit, Exhibit 3 and Baltimore Affidavit, Exhibit 5.)

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34. Again, however, Mr. Bender was probably influenced not to call Mr. Mate, after interviewing him, since he might testify to the detriment of Mr. Katzman in a number of ways. More importantly, once the decision was made not to call Mr. Nathan or Mr. Katzman, it was better to put on no defense than to call Mr. Mate, as a lone witness.

35. Finally, the conflict of interest also affected Mr. Bender's ability to cross-examine the Government witness - Sanford Katz. Katz testified that it was Mr. Katzman's method to write off the stale checks after five years and that Mr. Katzman had spoken to Revenue Agent Kerr about his plan. Sanford Katz also testified that he himself had wanted to write off the stale checks within approximately 12 months but that Mr. Katzman had disregarded his advice. (See App. 308-312 annexed hereto as Exhibit 12.) Mr. Bender, on cross-examination of Sanford Katz, never brought this point home. He never opened the door for Sanford Katz to emphasize that it was all Mr. Katzman's idea to use the five (5) year write-off system which ultimately resulted in an indictment for 1967 and subsequent years. If Sanford Katz's system had been used, then it is at least possible that no indictment would have arisen at all on these stale checks since all of them would have been written off during the regular audit. Alternatively, and more reasonably, the jury might have believed that Mr. Nathan had been misled by both Sanford Katz and Mr. Katzman and that Mr. Nathan could not be found guilty.

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36. In this regard it is also very interesting to note that another Joseph Katzman affidavit, dated January 11, 1974, (Exhibit 13) clearly contradicted Sanford Katz's statements regarding who worked out the arrangement for reversal of stale checks with the I.R.S. While Sanford Katz blamed Katzman from the witness stand, the latter, in his affidavit, clearly pointed the finger at Sanford Katz. It would appear, at the very least, that this dispute could have been utilized for Mr. Nathan's benefit but regrettably nothing was done with it and Mr. Nathan was again left carrying the burden of the accountants' errors and disagreements.

37. To compound the foregoing problems for Mr. Nathan is the fact that just three days before the trial he had an emergency eye operation for a "detached retina". As a result of that surgery, he was undergoing discomfort throughout the trial and was not permitted to read nor was he capable of reading. His doctor had given him instructions (see Exhibit 14) to the foregoing. Mr. Bender had been advised of this before the trial* and during the trial numerous references to the fact that Mr. Nathan was suffering eye problems and post-operative effects were made. These medical problems further incapacitated Mr. Nathan. He was weakened in his ability to make his points

* Mr. Nathan had in fact requested Mr. Bender to obtain a trial adjournment because of his operation, but Mr. Bender advised him that without a stronger letter he did not believe he could get an adjournment.

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clear to counsel and to emphasize his right to make certain decisions at the trial - e.g. his right to take the stand; his right to call witnesses. Further, he was hampered in his ability to discern the problems and conflicts at the trial by his medical problems. While even a person in full health cannot perceive the problems which occurred at this trial or overcome his attorney's trial decisions, the situation becomes even more difficult or impossible for someone who is not physically well.

38. As a further detriment to obtaining a fair and complete trial, Mr. Nathan's visual infirmity required him to sit at the defense table with his one eye covered or his head bowed over the table, for much of the trial. (See Baltimore affidavit Exhibit 5.) From this unusual behavior the jury could well have believed that Mr. Nathan acted suspiciously or in a guilty manner.

39. While I do not believe it is necessary to illustrate or amplify on the impact of the foregoing trial impediments on the jury, there is some evidence that the verdict at trial was not one based on a fair and impartial consideration of the facts. The verdict itself indicates that the jury had substantial difficulties in understanding and analyzing the case. The logical inconsistency of a guilty verdict on the first four counts and no verdict on the last four counts is some evidence of this. The impact of presenting a completed defense case on the jury would, no doubt, have been significant.

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40. Furthermore, on the last day of the trial, after the jury had been dismissed, the defendant's daughter - Bonita Nathan - heard a member of the jury (believed to be Mrs. Black) say that "they just convicted an innocent man" and other words to this effect. Bonita Nathan has set forth in her affidavit, annexed hereto as Exhibit 15, more fully what she heard and what she recalls having been overheard by another courtroom spectator (one unrelated to defendant in any way). All of this tends towards the conclusion that if the jury had received some substance in a defense case the verdict would probably have been an acquittal.*

41. This is more than a petition to vacate judgment. It is also an application to extend bail at this time until the defendant has a full and fair opportunity to develop and prove more facts relating to this application. I believe the facts shown in this petition alone warrant a new trial. Nevertheless, if this Court wishes to give Mr. Nathan every opportunity to prove that his constitutional rights were denied him then he must be granted a plenary hearing on the issues raised herein. Until such hearing is had, he should not be incarcerated for there is a great likelihood that he is innocent and that he did not receive the type of fair trial with counsel to which he is entitled.

* In addition to the above events, there was also an unrelated incident during the jury's deliberations which may have substantially influenced the jury and deprived Mr. Nathan of his right to a fair and impartial verdict. The incident involved an approach made to a juror - Mrs. Shapiro - by a man who was a spectator in the trial. This incident is reflected in the record. (See transcript, pp. 627-632, Exhibit 16.) It was this incident which resulted in the request for a partial verdict at the end of the first day of the verdict. It will be recalled that the partial verdict on the first day was for guilt on four counts and no verdict was reached on the second day of deliberations.

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42. Mr. Nathan is a 64-year-old businessman, living with his family who has no prior record of convictions. By no stretch of the imagination is there any danger to the community nor is there any risk of flight in this case. Since the indictment he has been free on his own recognizance and has properly litigated his defense through the judicial system. Under the appropriate standards of the Bail Reform Act, 18 U.S.C. § 3141 et seq., he meets all the requirements for continuance on bail. Nor do I believe that it can be said that the issues he raises in this petition are frivolous or without merit. In the event this Court has any reason to believe additional security should be required from Mr. Nathan, I am advised that he is prepared to post any reasonable bail.

43. It should also be noted that there is still pending a petition for writ of certiorari.

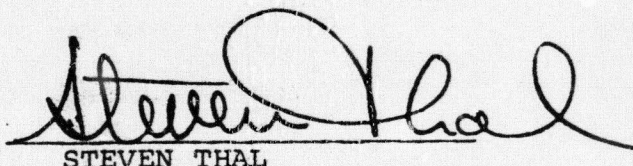
44. In cases such as this it is always the initial act of incarceration which is most traumatic to an individual, his family and his community. Once that takes place, it can never be undone. If Mr. Nathan is entitled to any relief from judgment and sentence then he should most certainly not be required to go to jail now. All of his rights (and all of the wrongs which he has suffered) will to a large degree become moot once he begins to serve his sentence.

45. In connection with a hearing on this petition, it is requested that Mr. Nathan be given limited discovery rights in two areas: 1) an opportunity to explore the conflict issue by

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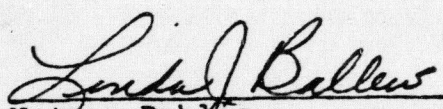
discovery of Mr. Katzman, Mr. Bender and any other person who may have knowledge of the facts and circumstances surrounding this dual representation; 2) an opportunity to obtain the jury list and the right to interview the jury regarding any irregularity in the verdict based on the incidents cited previously herein.

46. No prior application under 28 U.S.C. § 2255 has been made.



STEVEN THAL

Sworn to before me this
6th day of October, 1976



Notary Public
Linda J. Ballew
Notary Public, State of New York
No. 31-4633582
Qualified in New York County
Commission expires Mar. 30, 1978

EXHIBIT 1, ANNEXED TO AFFIDAVIT OF STEVEN THAL.

NEW YORK, N. Y. 10004

~~Exhibit 1~~

BEST COPY AVAILABLE

SUBMITTED TO: Miller, Cassidy, Larroca and Lewin
2555 M Street, N.W. - Suite 500
Washington, D. C. 20037

CONFIDENTIAL
ATTENTION:

Nathan Lewin, Esq.

RE: Jack Nathan July 8, 1976
(Name of Subject) (Date)

ARRANGEMENTS: The above named subject, was given a Polygraph Examination for the purpose of determining the truthfulness of the answers to the following questions.

Subject signed statements releasing all parties concerned and empowering this examiner to disclose to those in authority his opinions, as well as information elicited during said test.

PROCEDURE: A three pen Stoelting Polygraph was utilized to register changes in blood-pressure, rate and strength of pulse beat, galvanic skin response, and the respiratory pattern.

DESCRIPTION: Subject was born November 3, 1911, height 5'10", weight 170 lbs.

BACKGROUND: Subject was born in New York City and for the past ten years has resided at 9916 70th Avenue, Forest Hills, N.Y., in a private home, with his wife and two children.

EDUCATION: Subject graduated Eastern District High School.

EMPLOYMENT: Subject is the President of Nathan, Nathan, Nathan, Inc.

MILITARY: Subject served in the U.S. Air Force, rank of Sergeant, from 1942 to 1944 when he received an honorable discharge.

EXHIBIT 1, ANNEXED TO AFFIDAVIT OF STEVEN THAL

MEDICAL: Subject was in the N.Y. Eye, Ear, Nose and Throat Hospital for a detached retina in his left eye in 1975.

PURPOSE: The purpose of this test is to determine if during the years of 1966, 1967, 1968, 1969 and 1970 subject was deliberately evading payment of taxes.

The following relevant questions were asked with the indicated answers given:

3. Do you intend to answer all questions on this test truthfully? Yes
5. Prior to filing your 1966 taxes did Allan Edwards tell you that stale checks had to be written off before he would prepare your tax return? No
10. Did you pay Sandy Katz to take the blame with the I.R.S.? No
19. During the years 1967, 1968, 1969 and 1970 did you know that stale checks were being improperly carried as expenses? No
23. During 1967, 1968, 1969 and 1970 were you using stale checks to evade taxes? No
27. Prior to the I.R.S. investigation, did you know the checks you were carrying at hotels were being treated by Katz as refund checks? No
33. Have you lied to me on this test? No
35. Do you honestly believe you passed this test? Yes

EXAMINER'S
OPINION:

Reactions which are usually indicative of deception were apparent in this subject's recorded response to question #5. However, there were no deceptive reactions observed in subject's recorded responses to any of the other relevant questions, and it is this examiner's opinion that this subject answered all these other questions truthfully. It is further this examiner's opinion that in 1967, 1968, 1969 and 1970 this subject did not know that stale checks were being improperly carried as expenses, and they were not being used to evade payment of taxes.

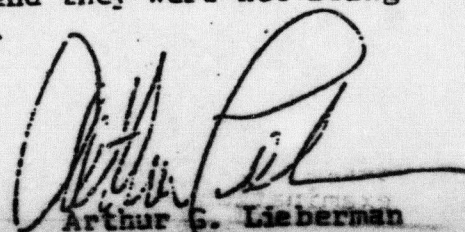

Arthur C. Lieberman
Polygraphist

EXHIBIT 1, ANNEXED TO AFFIDAVIT OF STEVEN THAL

New York Lie Detection Laboratories

A Division of Victor C. Kaufman Inc.

17 Bantery Place, New York, New York 10004 - Since 1923 - (212) CO-located 7-3535-39

AGREEMENT AND RELEASE

In consideration of New York Lie Detection Laboratories and

NATHAN LEWIN ESQ. .. agreeing to subject the
undersigned to a Polygraph Exam known as a Lie Detector Test,
I hereby agree to save and hold s. release and forever dis-
charge the said New York Lie Detection Laboratories,
NATHAN LEWIN ESQ. .. the examiner from any
and .. suits or causes of action which I, my heirs, executors or adminis-
trators may have by reason of said test, either directly or indirectly.

As a further inducement to have the said New York Lie Detection Laboratories conduct said test, I hereby represent that I am in good physical and mental condition and know of no physical or mental ailment which might cause any impairment to my health.

Although I understand and realize that the examination results and opinions may prove unfavorable to me, I also consent that the said New York Lie Detection Laboratories may disclose the results and the information obtained by reason of the said Polygraph Examination, to anyone on whose behalf the New York Lie Detection Laboratories has been employed to perform the said test upon me or anyone designated by NATHAN LEWIN ESQ.

This instrument may not be changed or altered without the written consent of both parties.

The undersigned represents that he has read this instrument in its entirety.

In Witness Whereof, we have hereunto signed and executed this instrument

Date 7-8-76 Time 4:22 PM

This examination was concluded at .. Having freely taken this examination, I reaffirm my agreement above. I state that during this examination, I was well treated and remained of my own free will during the entire course of the examination, knowing I could leave at any time I so desired. I also certify that there were no threats made to me, nor harm done to me, nor any promises made to me during the entire interview and examination. I was free to refuse to answer any question or questions. All questions were read to me before taking the examination.

EXHIBIT 2, ANNEXED TO AFFIDAVIT OF STEVEN THAL.

1 hph 74

2 so many of us here and do be here very promptly at 10,
3 or even a few minutes before and you come back to the
4 jury room. I hope you have a very nice evening.

5 (Jury left.)

6 THE COURT: May I see counsel in the robing room
7 for a minute.

8 (In the robing room.)

9 THE COURT: I thought this might be a good time
10 to get into this problem which the government has raised.

11 I understand there is some witness.

12 Who is this witness?

13 MR. WOHL: Mr. Katzman, Joseph Katzman, your
14 Honor.

15 THE COURT: And you don't know whether you are
16 going to call him or not but you may want to call him on
17 rebuttal and as I understand it, is it?

18 MR. BENDER: Who was at some time an attorney
19 for Mr. Katzman.

20 MR. WOHL: That's right.

21 THE COURT: And the question is whether there
22 is a conflict of interest here, should he testify, is that
23 right?

24 MR. WOHL: I think that it is just a question.
25 as Mr. Bender explain: it to me, making sure that Mr. Nathan

EXHIBIT 2, ANNEXED TO AFFIDAVIT OF STEVEN THAL
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understands that and is agreeing to waive--.

THE COURT: If, assuming, it happens.

MR. WOHL: That's right.

THE COURT: Poor Mr. Nathan, he has to rely
on Mr. Bender. Do you have any problem with this, Mr. Nathan?

THE DEFENDANT: No, your Honor.

THE COURT: None at all?

THE DEFENDANT: None whatsoever.

THE COURT: If the government says, if this
gentleman, Mr. Katzman should testify, as far as any privilege
that might exist between you and Mr. Katzman, you waive that?

MR. BENDER: Judge, that's not the question.
The question is not privilege.

THE COURT: What is it?

MR. BENDER: There are two problems. One is,
Mr. Nathan's right under the Sixth Amendment to counsel. The
second problem that you face as a result of that Sixth
Amendment, is my representation of Joseph Katzman, which
antedates my being retained by Mr. Nathan, in a totally
unrelated matter.

Now, if Mr. Katzman testifies as a witness,
obviously, I can't disclose any confidential communication
given to me by Mr. Katzman, but at the same time, Mr. Nathan
is entitled to my complete loyalty and I am placed in a

EXHIBIT 2, ANNEXED TO AFFIDAVIT OF STEVEN THAL
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position where he could very well feel that my representing
Katzman in a different case, he is getting divided loyalty,
so to speak.

I have explained this to Mr. Nathan, and Mr.
Wohl said he doesn't know whether he will call him, at
the present time he has no intention of calling him but
he may call him at rebuttal.

To overcome that problem, Mr. Nathan is willing
either to permit, which I prefer, Judge Baltimore to cross-
examine --

THE COURT: I would prefer that too. I think
that would make a lot of sense. You have never had Mr.
Katzman.

MR. BALTIMORE: No, I have not.

THE COURT: I think that makes a lot of sense.

MR. BENDER: And yet at the same time, I think
for Mr. Nathan's protection and for all concerned, since
this Fifth Circuit Court case, United States v. Garcia, which
I gave Mr. Wohl and Mr. Rankin, the Fifth Circuit holds
in a different situation, holds that the defendant has his
Sixth Amendment rights under these circumstances, I felt
Mr. Nathan should do this under the circumstances so that
I am not criticized by your former Bar Association which
you were the head of and my American Bar Association, the

EXHIBIT 2, ANNEXED TO AFFIDAVIT OF STEVEN THAL
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Circuit Court of Appeals, if there is an conviction.

THE COURT: Mr. Nathan, is this clear to you,
talking about the Sixth Amendment, right to counsel?

THE DEFENDANT: Your Honor, I have complete
confidence in Mr. Bender and Judge Baltimore. Whatever
they do, I am one hundred percent in accord.

THE COURT: And if they say to you in doing this,
you might be waiving the Sixth Amendment privileges,
is that agreeable to you?

THE DEFENDANT: I will do anything they say, your
Honor.

THE COURT: The only thing, tell Mr. Katzman
not to talk to Judge Baltimore. Will you warn him about
that, the government?

MR. BENDER: I have spoken to Mr. Katzman yesterday,
and told him I was disclosing the question and I asked him
if he has any objection to my still representing Mr. Nathan
under these circumstances, and he said absolutely none.
But, I think we should get from Mr. Nathan, with all due
respect to Mr. Nathan's answers, I think we should get
from Mr. Nathan an expressed statement, not that he is following
Judge Baltimore and me blindly, but that he understands
the situation, that he agrees that he wants me--

THE COURT: Now you see what lawyers are like, Mr.

1 hph 78 EXHIBIT 2, ANNEXED TO AFFIDAVIT OF STEVEN THAL
2 Nathan. I think that is a point. You do understand the
3 situation.

4 THE DEFENDANT: Unfortunately I know lawyers
5 and I love them but I don't like accountants.

6 THE COURT: I can understand that too. But the
7 point is, totally apart from your reliance on Mr. Bender
8 and Mr. Baltimore, I want to ask you do you understand
9 the situation?

10 THE DEFENDANT: I do.

11 THE COURT: Regardless of your reliance on the
12 you do waive any right that you may have, is that correct

13 THE DEFENDANT: Yes, your Honor.

14 MR. BALTIMORE: I want to ask for the record
15 try to keep referring to me as mister. If this record
16 should go to the Circuit Court I don't want my friend to
17 say anything. Try to keep it mister.

18 THE DEFENDANT: I know the judge for many year
19 and I keep calling him judge.

20 THE COURT: The point is, it is a question for
21 the jury. It is not necessarily that being a judge may t
22 you. It might even help you because there is so much o:
23 judges. Let's keep it to Mr. Baltimore.

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: Thank you. Anything any of you ca
move this along I will help you.

(Adjourned :o October 2, 1975, at 10 A.M.)

EXHIBIT 3, ANNEXED TO AFFIDAVIT OF STEVEN THAL.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JACK NATHAN, being duly sworn, deposes and says:

1. I am the defendant in the matter of United States v. Nathan, 74 CR 377.

2. In about November, 1971, I retained Joseph Katzman, C.P.A., to take charge of my accounting affairs during the pendency of an I.R.S. audit. I felt that my regular accountant, - Sanford Katz - had been too slow in concluding this audit. Mr. Katzman immediately became the key man representing me and he took charge of all aspects of the audit and the preparatory work. In doing so, he soon discovered that Sanford Katz had fallen years behind in keeping my books and filing my tax returns. When he uncovered this, Sanford Katz admitted all of his wrongdoing to Mr. Katzman. When I learned of this, I immediately wanted to file criminal and other charges against Sanford Katz but Mr. Katzman persuaded me not to do so. When Mr. Katzman learned of these wrongdoings, he prepared an affidavit for Sanford Katz in which Katz accepted the burden of his misdeeds.

3. At no time during the period that Mr. Katzman represented me did he ever disclose to me that he had any problems with the I.R.S. (or any other government agencies). Even when he resigned the engagement he did not tell me of any personal legal problems. Furthermore, he never advised me that he retained Louis Bender, Esq. on his behalf.

EXHIBIT 3, ANNEXED TO AFFIDAVIT OF STEVEN THAL

4. Mr. Katzman withdrew from this engagement when he learned that the audit had been transferred to the intelligence division of the I.R.S. He never explained his reasons for withdrawal. In fact, I only learned that Special Agents had become involved when my bank advised me of subpoenas for my accounts.

5. After Mr. Katzman resigned I hired Mr. Ted Mate to represent me before the I.R.S. Mr. Mate took complete charge of my case.

6. When I first retained Louis Bender, Esq. as my counsel I advised him that I felt Messrs. Katzman and Mate, as well as myself, would be the key witnesses in my own defense. Throughout the course of his representation of me - up to and including the trial - I insisted on taking the witness stand and on calling both Messrs. Katzman and Mate as witnesses.

As evidence of this I submit herewith photocopies of certain pages of a notebook which I kept during the course of the trial. It is readily apparent from my notes in this book (which I discussed daily with Mr. Bender during the trial) that I wanted to call the above witnesses.

7. When I first retained Mr. Bender he assured me that Mr. Katzman would be a good witness on my behalf. Only during the trial did he seem to back away from this decision.

8. At no time before the eve of trial did Mr. Bender indicate to me that he had ever represented Mr. Katzman (directly or indirectly) or even that he ever heard of Mr. Katzman except as related to my case.

EXHIBIT 3, ANNEXED TO AFFIDAVIT OF STEVEN THAL

9. During the pre-trial preparation of my case, Mr. Bender asked me about the Subchapter S status of Nathan, Nathan & Nathan Ltd. I advised him that I knew nothing of these matter and that any change in the status of the Company was the doing c Mr. Katzman and that Mr. Katzman initiated these conversations and gave me whatever instructions were necessary in this regard.

10. Only on the eve of trial (I believe it was the night before the trial opened) Mr. Bender told Mr. Baltimore and myself that he represented a client of Mr. Katzman in an "unrelated matter" and that he could not disclose the details. It was my clear understanding that Mr. Katzman was not the subject of the other matter and that he was only involved as an accountant for the other client. In subsequent discussions with Mr. Baltimore he has confirmed that this was also his total understanding of Mr. Bender's disclosure that evening. Neither of us had the slightest idea before or during the trial that Mr. Bender represented Mr. Katzman.

Furthermore, Mr. Bender never advised us that Mr. Katzman was in any way involved in a criminal investigation.

11. At the conference before Judge Bonsal on the first day of the trial when I was asked to consent to Mr. Baltimore's cross-examining Mr. Katzman, I never understood the full nature of the problem. I believed that there was some legal reason for substituting Mr. Baltimore for this one part of the trial and nothing more.

EXHIBIT 3, ANNEXED TO AFFIDAVIT OF STEVEN THAL

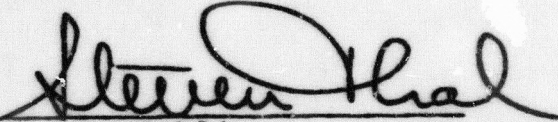
12. During the trial I argued with Mr. Bender daily regarding my desire to take a more determined posture at the trial. I told him that I wanted to testify and that I wanted other witnesses called. He rejected these approaches and told me "not to do my own surgery." My trial notes referred to previously and which are annexed hereto, should serve as ample evidence of my position at trial.

13. My general presence and resolve at trial were substantially impaired by the fact that I had undergone painful eye surgery for a "detached retina" a few days before the trial began. I had even asked Mr. Bender to obtain an adjournment of trial because of my discomfort and my doctor's instructions not to read or engage in strenuous activity. No doubt this physical impairment diminished my ability to participate in and contribute to my defense.

14. In a recent telephone conversation with Mr. Katzman he advised me that Mr. Bender had done a very good job on his case and that everything had turned out very well for him.

Sworn to before me this

6th day of October, 1976


Notary Public

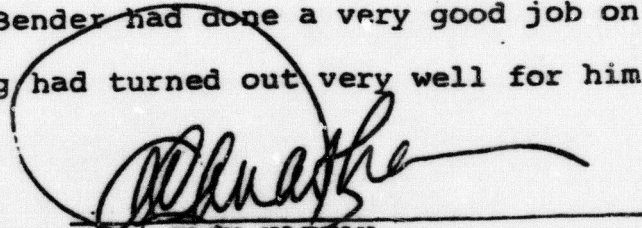

JACK NATHAN

EXHIBIT 3, ANNEXED TO AFFIDAVIT OF STEVEN THAL

Sandy must be called back
to factory

5. Her legal name Mrs. Security of
Gentle's Factory, as is (dark glasses) & others me.

6 - Sandy told me had professional insurance -
also confessed to Katzman that he had died to
live about it. - All employees insured
for \$50,000 blanket.

(+) 7. Why wasn't jury told checks for
\$80,000 were drawn - (interest added)
~~interest~~

8. No checks are ever stop payment -
even if charged back to income.

9. Sandy stalked Kern Jr. about 1 yr.
kept lying to me.

10. Didn't tell jury got
glitch, after the person that was mugged
raped and not the mugger & rapist.
Katzman. to take stand!

11. When Katzman called me & told me
about Sandy, that he had confessed all to him.
I went to Katzman office, called Katz & wife
to find out when Katz was. She

EXHIBIT 3, ANNEXED TO AFFIDAVIT OF STEVEN THAL

for me not to get excited that she would leave Sandy. Sandy called me at Katzman's office within 20 min & pleaded with me not to hurt him if he would come into Katzman's office.

12 - Katzman told me not to turn Sandy in - He reasoned that the juic thing to do was to have Sandy get things in order & fill all holes.
Katzman's conversation with Kern re outstanding checks

13 - Question - How come Katzman who ~~at~~ evidently at that time had for trouble himself took my down patly to handle me? ~~Katzman~~ I only found out about Special Agent ~~transfer~~ from Chas Bart - When I called Katzman he admitted he neglected to tell me. (P.S. - that's why he never called me) (Katzman did nothing for me)

14 - ^{if called Katzman in 11 days - he never returned call - finally got him in Melrose, met him in Cambridge, Boston} Katz on Stand re Katz incompetence & that I told him I wanted to turn Katz in. ^(and further harassment)

EXHIBIT 4, ANNEXED TO AFFIDAVIT OF STEVEN THAL.

United States of America)
 District of) ss

I, Joseph Katzman, state that:

I reside at 70 East 70 Street NYC

I am a partner in Pipper Katzman Electric
 Certified Public Accountants, 79 Madison Ave NYC
 Bronx Project in September 1961. I was contacted
 by Jack Nathan who indicated in making an
 insurance change. He told me that he had an
 audit in progress involving the company's 1961
 tax return. I was told that the audit was
 apparently the only one in progress at that time. I
 thereafter attended a meeting with General Agent
 Mr. Thomas agent and Sanford Katz the
 then current accountant. Katz indicated that he
 had inspected the 1961 return and noted that
 the records and returns for January to 1969.
 Katz appeared to be made. In several instances
 to be attended by myself and Katz, for the
 of reviewing and the general agent at my office.
 In the aforementioned date Katz came to my office
 to advise that he had not kept the 1962
 records up to date and that he had consulted the
 aforementioned agent. I then telephoned the
 General Agent of the company.

Shortly thereafter in my office I advised Katz
 and Mr. Nathan that the records must be
 completed and the delinquent returns filed. (P)

EXHIBIT 4, ANNEXED TO AFFIDAVIT OF STEVEN THAL

During the conversation it was decided to see that the books reflected outstanding checks for a number of years. It was agreed that I should undertake to prepare to determine whether it was not clear as to appropriate adjustment to make the books for them. At this point Sam Nathan advised me that he had an arrangement with the bank to honor past dated checks and that many old issued checks were being paid by his bank.

Thereupon the books were brought up for 1963 and 1970 and returns were filed. I prepared for Katz and filed. I did not see these returns at that time. I have seen it since then. Since the copies made on the schedule of checks I had requested.

After that I had subsequently seen the returns which collection activity by I.R.S. was initiated. (M)

EXHIBIT 4, ANNEXED TO AFFIDAVIT OF STEVEN THAL

I was informed by the Dept. that
 disbursements had been made ~~for~~ for
 outstanding checks which were post dated
 before the permits to remove but I
 do not know on what basis.

I made it clear to Mr. Nathan that
 outstanding checks should represent items that
 were in the process of being paid and that
 should be the basis for carrying items
 as outstanding. I further told Mr. Nathan
 that the Accounting Dept would make the
 final determination as to the adjustment
 based on the facts.

As the 1969 tax return for the Corporation
 was filed I advised the picture
 Mr. Nathan told me there was a
 change in ownership in the Corporation
 and suggested a change from one 1120
 to another 1120 Corporation for 1969 as the
 change in ownership took place in
 January, 1969. I then told him that he would
 have to have documentation to support this
 change including minute book entries and
 stock records. Mr. Nathan assured me
 that he did have the desired legal
 documents.

EXHIBIT 4, ANNEXED TO AFFIDAVIT OF STEVEN THAL

I never saw the documentation that I had been requested by Mrs. Nathan. (10)

I never actually took on this account as an audit client. I had very limited contact with the Mrs. Nathan and his corporation. I terminated my association with them in August 1971. When they were contacted by the Intelligence Bureau I never called Mrs. Nathan or his corporation and did not receive any fee.

On August 23, 1971 at my office I asked Mrs. Nathan to give me an affidavit regarding his corporation's filing return for the corporation. I dictated it and he signed it.

In this affidavit where we talk about irregularly prepared returns we refer to the Jan 10, 70 of Nathan based on estimated income and to items of personal income not documented. His indication was given to me of unreported income from the corporation. I checked the past due checks there in income.

EXHIBIT 4, ANNEXED TO AFFIDAVIT OF STEVEN THAL

*I certify that the foregoing
shall be true and correct.*

I have read the foregoing statement consisting of 5 pages, each of which I have signed. I fully understand this statement and it is true, accurate and complete to the best of my knowledge and belief. I made the corrections shown and placed my initials opposite each.

I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it.

Subscribed and sworn to before me this 11

day of May

1977

at San Jose, California

Joseph K. Kline
(Signature of affiant)

Thomas J. Kline
(Signature)

Supervising Special Agent
(Title)

Internal Revenue Service

Mark J. Kline
(Signature of witness, if any)

EXHIBIT 5, ANNEXED TO AFFIDAVIT OF STEVEN THAL.

STATE OF NEW YORK)
)SS:
COUNTY OF NEW YORK)

RICHARD L. BALTIMORE, JR., being duly sworn, deposes and says:

1. I am an attorney at law admitted to practice in the State of New York and in the United States District Court for the Southern District of New York.

2. During my years of practice, I have been an Assistant Corporation Counsel for the City of New York, a director of the American Arbitration Association, a member of the Westchester County Grievance Board, a member of the Committee on State Courts of Superior Jurisdiction of the Association of the Bar of the City of New York and am an Acting City Judge for the City of New Rochelle.

3. I have been a long time friend of Mr. Jack Nathan and as such, he requested my participation at his trial before this Court.

4. As a Judge, I had to get special permission in order to appear at the trial, which permission I obtained. Nevertheless, I attended the trial in my capacity as Mr. Nathan's friend and confidant but I was not there as his trial counsel. To the best of my recollection, I was not at the trial more than fifty percent of the time, if that.

EXHIBIT 5, ANNEXED TO AFFIDAVIT OF STEVEN THAL

5. I can confirm that during the time I was there, there were defense witnesses who were available to testify. Further, Mr. Nathan always wanted to take the stand in his own defense and to have Mr. Joseph Katzman and Mr. Ted Mate called as witnesses.

6. I first learned of a possible conflict of interest on the part of Mr. Bender and a problem regarding his representation of Mr. Nathan on the evening before the trial began. At that time, Mr. Bender advised Mr. Nathan and myself that he represented a client of Mr. Katzman, which client had certain difficulties with the I.R.S. We were advised that Mr. Katzman was in some way involved with that matter.

Mr. Bender did not advise us that Mr. Katzman was the client nor did he advise us that he represented Mr. Katzman in a criminal investigation.

7. At the conference with Judge Bonsal on the first day of the trial when the Katzman cross-examination problem arose, neither I nor Jack Nathan understood that the problem went any further than simply that of cross-examining Mr. Katzman. We never understood that any greater conflict or problem existed.

EXHIBIT 5, ANNEXED TO AFFIDAVIT OF STEVEN THAL

8. I can also confirm that Jack Nathan had eye surgery a few days before the trial and that he requested Mr. Bender to obtain an adjournment of the trial. Mr. Nathan sat through the trial with his hand covering his eye and with his head bent down over the defense table. He acted this way because of the discomfort arising from the surgery.

I believe that these actions on the part of Mr. Nathan made a bad impression on the jury and might have caused the jury to think that he was acting deviously or with a sense of guilt.

Sworn to before me this
5th day of October, 1976.

Edythe K. Weinstein
EDYTHE K. WEINSTEIN
Notary Public, State of New York
No. 24-4624762
Qualified in Kings County
Commission Expires March 30, 1978

Richard L. Baltimore, Jr.
RICHARD L. BALTIMORE, JR.

EXHIBIT 6, ANNEXED TO AFFIDAVIT OF STEVEN THAL.

2 over a year. They were turned over to me in April of this
3 year and I am very frank to say that until Mr. Wohl
4 brought this out I never even noticed it.

5 THE COURT: I think what I will do with this is
6 I don't think I will hear the agent now. The defendant
7 is going to testify in his defense I take it?

8 MR. BENDER: This is my intention, but I
9 don't want to make any promises. You know what happens,
10 Judge, when you make promises and then -- seriously, I don't
11 want to mislead Mr. Wohl or you. It has been my intention
12 to call him, but as I say that matter, I will be very glad to
13 give your Honor a definite commitment as to what I intend
14 to do as soon as the government rests.

15 MR. WOHL: Your Honor, may I be heard for just a
16 brief moment?

17 THE COURT: Yes.

18 MR. WOHL: I think that undoubtedly there would
19 be a fact question that the jury would have to resolve on
20 this issue of the altered document as to whether or not
21 Katz was doing it on his own or doing it for Mr. Nathan.
22 I think the circumstances would be somewhat probative
23 therein that they could look at the question of who had some-
24 thing to gain from the alteration of the document. The
25 government, I think --

EXHIBIT 7, ANNEXED TO AFFIDAVIT OF STEVEN THAL.

TO WHOM IT MAY CONCERN:

I, Sanford Katz, am a certified public accountant and have been the accountant for Nathan, Nathan & Nathan Ltd. of 167 Third Avenue, New York, N. Y., as well as a number of its associated companies, and have also been responsible for the preparation of the corporate tax returns, as well as the personal income tax returns for Mr. Jack Nathan and his wife.

Due to the fact that I have had substantial emotional problems both with my wife as well as myself, I was negligent in that I did not prepare the corporate tax returns for Nathan, Nathan & Nathan Ltd., as well as its associated companies, for the years 1969 and 1970, respectively, and in some cases where there were fiscal years ending during 1971. Furthermore, the personal income tax return, Form 1040, as well as the associated New York State and New York City returns, for Mr. Nathan, and his wife did not include all of the income attributable to receipts from some of the companies controlled by Mr. Nathan.

All such returns have been amended or properly prepared and filed by the taxpayers and all taxes due, as well as interest accrued for late payment paid thereon prior to December 15, 1971.

Mr. Nathan was at no time aware of the fact that returns were delinquent or improperly prepared because at all times it was my duty to see to it that returns were prepared and timely filed, and at any time I submitted returns to him they were immediately signed, filed and the tax thereon paid.

The foregoing is a true statement of facts.

Respectfully submitted,

Sanford Katz

Sanford Katz

Sworn to before me this
29 day of December, 1971

William Zuckerman Leary
Notary Public

EXHIBIT 8, ANNEXED TO AFFIDAVIT OF STEVEN THAL.
 POPPER, KATZMAN & SCHECKMAN

CERTIFIED PUBLIC ACCOUNTANTS

70 MADISON AVENUE
 NEW YORK, N. Y. 10016

MURRAY HILL 5-6407-8-9

EDWARD B. POPPER, C.P.A.
 JOSEPH KATZMAN, C.P.A.
 ALAN L. SCHECKMAN, C.P.A.
 IRVING TARAGAN, C.P.A.
 AARON NEARNBERG, C.P.A.

March 8, 1972

Department of Taxation and Finance
 New York District Office
 Warrant and Collection Section
 250 Broadway
 New York, N.Y. 10007

Att: Mr. Robert Feld
District Tax Supervisor

Re: Nathan, Nathan & Nathan, Ltd.
 Case Number MA633583
Tax Period- Aug.-Dec. 1969

Dear Mr. Feld:

In connection with the late filing of withholding tax payments by the aforementioned taxpayer, we are submitting herewith a copy of a letter submitted to the City of New York relative to the fact that the late filing of the withholding tax payments to the State of New York was due to the fact that Mr. Sanford Katz, a Certified Public Accountant who was representing the aforementioned taxpayer, was responsible for the filing of the proper withholding tax payment forms and was to see to it that payments were made when properly due. Unfortunately, due to the fact that he was emotionally disturbed, he did not properly attend to the matter and we are accordingly submitting a copy of a statement by him, as well as a copy of an article that appeared in the Wall Street Journal on January 26, 1972, where the Internal Revenue Service, in circumstances of a similar nature, had waived penalties.

Very truly yours,

POPPER, KATZMAN & SCHECKMAN

By: *Joseph Katzman*

JK:LZ
 Encs.

EXHIBIT 9, ANNEXED TO AFFIDAVIT OF STEVEN THAL.

EDWARD B. POPPER, C.P.A.

JOSEPH KATZMAN, C.P.A.

ALAN L. SCHERMAN, C.P.A.

IRVING TARAGAN, C.P.A.

AARON NEARBERG, C.P.A.

March 2, 1972

Department of Finance
79 Worth Street
New York, N. Y. 10003

Att: Miss Stein

Re: Nathan, Nathan & Nathan Ltd.

EDN #13-1975200

167 Third Avenue, N.Y., N.Y. 10003
Calendar years 1969 and 1970

Gentlemen:

Your notice of penalty assessment mailed on Feb. 24, 1972 to the aforementioned taxpayer, assessing penalties for late filing in 1969, as well as 1970, were referred to the undersigned.

The taxpayer had Sanford Katz, a Certified Public Accountant, prepare all of the tax returns that were required to be filed. At all times the taxpayer relied on such accountant to properly prepare tax returns and see that they were timely filed. Unfortunately, Mr. Katz had some degree of emotional disturbance during the years involved and failed to file returns when properly due. During the course of an examination by the Internal Revenue Service of one of the associated companies, it was disclosed that Mr. Katz had been delinquent in preparing tax returns and filing them timely, and accordingly steps were immediately taken to see that all returns that were due were filed and interest computed from the date when the return was due to the date of filing.

It is respectfully requested that in view of the circumstances involved that such penalties be waived for the calendar years 1969 and 1970.

For your records we are submitting herewith a copy of the statement signed and sworn to by Mr. Katz, as well as a copy of a notice that appeared in the Wall Street Journal on January 26, 1972, whereby the Internal Revenue Service has taken into consideration the fact that the taxpayer was not wilfully delinquent in filing tax returns in his reliance upon the professional requirements of a Certified Public Accountant, he went on the theory that matters were being handled properly.

Very truly yours,

Joseph Katzman

E

EXHIBIT 10, ANNEXED TO AFFIDAVIT OF STEVEN THAL.

POPPER, KATZMAN & SCHECKMAN

CERTIFIED PUBLIC ACCOUNTANTS

79 MADISON AVENUE

NEW YORK, N. Y. 10016

MURRAY HILL 5-6407-8-9

EDWARD B. POPPER, C.P.A.

JOSEPH KATZMAN, C.P.A.

ALAN L. SCHECKMAN, C.P.A.

IRVING TARAGAN, C.P.A.

AARON NEARNBERG, C.P.A.

May 25, 1972

Mr. Jack Nathan
Nathan, Nathan & Nathan, Ltd.
167 Third Avenue
New York, N. Y. 10003

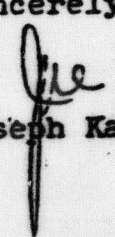
Re: Credit Card Associates Inc.

Dear Jack:

In connection with the return filed for Credit Card Associates Inc. for the fiscal year ended August 31, 1969, in computing interest Sandy Katz underaccrued \$16.25 which should be paid. On the basis of the letter that we had written to the City of New York, explaining the reason for the late filing of the return, they waived the penalties imposed for the fiscal year ended August 31, 1969. However, the interest is due.

Would you therefore please make payment of the \$16.25 at once and mail the check together with a copy of the enclosed form in the envelope furnished herewith.

Sincerely yours,


Joseph Katzman

JK:LZ
Encs.

EXHIBIT 11, ANNEXED TO AFFIDAVIT OF STEVEN THAL.

EDWARD D. POPPER, C.P.A.
 JOSEPH KATZMAN, C.P.A.
 ALAN L. SCHECKMAN, C.P.A.
 IRVING TARAGAN, C.P.A.
 AARON NEARINBERG, C.P.A.

August 15, 1972

Mr. Jack Nathan
 Nathan, Nathan & Nathan, Ltd.
 167 Third Avenue
 New York, N.Y. 10003

Dear Jack:

In discussing the penalties imposed, I reviewed the matter with the Offer in Compromise Section and the minimum offer that would be considered is a 5% negligent penalty for late filing and the Offer in Compromise Forms 656 have been prepared accordingly.

However, in preparing the tax returns which were filed late, Sandy Katz made errors in computations of interest and in some instances errors in computation of the tax. The additional amounts due, as disclosed in the following schedule, cannot be compromised and must be paid in full. Accordingly, it would be necessary to have checks drawn by the following corporations as follows:

<u>Nathan, Nathan & Nathan, Ltd.</u>	
Calendar year 1969	\$ 998.21
Calendar year 1970	37.68
<u>Credit Card Association Inc.</u>	
Year ended 8/31/70	83.14
<u>Airlines Credit Association Ltd.</u>	
Calendar year 1969	188.75
Calendar year 1970	83.68

I have checked all of these computations, requiring additional payments and find them to be correct.

The Offers in Compromise (Forms 656) are to be signed by you as President, in triplicate. The powers of attorney for the respective corporations are also to be signed by you as President in duplicate.

I have made arrangements to meet with Mr. Clifford on Tuesday afternoon at 2 o'clock, and should you wish to accompany me you are more than welcome to do so.

Sincerely yours,

Joseph Katzman
 Joseph Katzman

JK:LZ
 Encs.

EXHIBIT 12, ANNEXED TO AFFIDAVIT OF STEVEN THAL.
rgh 142 Katz-cross

1
2 Q Isn't that right?

3 A No, no. Wait a minute. Wait a minute. At a
4 subsequent meeting after the work was being brought back
5 to condition and returns were being readied to file -- we
6 are talking about a period of three to four weeks later from
7 that point, at a meeting with Mr. Katzman, Mr. Nathan
8 and myself Mr. Katzman -- no, I brought up the question
9 of outstanding checks at that time again because I
10 was filing now '69 and '70.

11 Q These were the 1969 and 1970 Nathan returns --

12 A Correct.

13 Q Which had not been filed and which were later
14 filed in December, 1971?

15 A That's correct. So this period I am talking
16 about now is approximately November, '71. Okay. Now,
17 do you want me to relate what happened at that conversation?

18 Q Please.

19 A At that conversation I brought up the outstanding
20 checks. Mr. Nathan was present and Mr. Katzman was
21 present at his office. Then we discussed how to handle
22 this accountingwise. Mr. Nathan said do what has to be
23 done. Whatever has to be done, I don't understand what
24 you two are talking about. Mr. Katzman said wait, I
25 have mentioned this to Revenue Agent Kerr in conjunction

EXHIBIT 12, ANNEXED TO AFFIDAVIT OF STEVEN THAL
rgh 143 Katz-cross

1 with the audit and this is my idea and my plan of what

2 should be done to handle this accounting situation. "w

3 opinion at that point was not asked. When I gave it to Mr.

4 not listened to and I just sat there listening to Mr.

5 Katzman try to help the situation or remedy the situation

6 or determine what had to be done.

7
8 Q When you say your opinion wasn't listened to,
9 by whom?

10 A By Mr. Nathan surely. By Mr. Katzman, he was
11 my senior by approximately 40 years, 35 years, so I just
12 listened to what his advice and counsel on the situation was.

13 THE COURT: The question is whether you expressed
14 views or you didn't express views.

15 THE WITNESS: Yes, I did.

16 THE COURT: You don't know whether they listened
17 to you or not, do you?

18 THE WITNESS: I know they didn't listen to me
19 because they didn't perform the work in the manner in which
20 I thought it should be done.

21 Q Tell us the manner in which you thought it should
22 be done.

23 A I thought the revenue agent was involved in
24 a '68 audit and he was looking at checks from '63, '64,
25 '65 and '66, and perhaps even '67 at that point, so I

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EXHIBIT 12, ANNEXED TO AFFIDAVIT OF STEVEN THAL
rgh 144 Katz-cross

1
2 believed that those checks were under his investigation
3 at that time. So I said if there are any current checks,
4 any outstanding checks over 13 months or 12 months or
5 whatever they should be written off currently and all those
6 other checks should go under the advice of Mr. Kerr during
7 the audit. Now, my original bank reconciliations were set
8 up that way, with the removal of more current years.

9 Q Excuse me, I don't mean to interrupt you, but
10 was this question of how to handle the outstanding checks
11 discussed with Mr. Kerr in your presence?

12 A Yes.

13 Q In what way? Tell us the conversation.

14 A Okay. The conversation took place in approximately
15 August, 1971. As we were adjourning the meeting and setting
16 an appointment for another meeting Mr. Katzman brought up
17 the question to Mr. Kerr about the advisability of a periodic
18 writeoff, every fifth year to write off one of the years.
19 Mr. Kerr stated to him that he was in no position to
20 either give a ruling or even to comment on this, considering
21 that he would have to present anything like this to his
22 supervisor or superior or group chief or something like that
23 and that he would talk to him further about it. This was
24 the only time that Mr. Katzman mentioned it, at the end of
25 that meeting and then we were going to discuss it further.

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EXHIBIT 12, ANNEXED TO AFFIDAVIT OF STEVEN THAL

1 rgh 145 Katz-cross

2 at a subsequent meeting.

3 Q Then what actually developed as a result of Mr.
4 Katzman's direction to you, you indicated, was that the 1963
5 and 1964 outstanding checks were credited back to income in
6 the delinquent 1969 return, is that right?

7 A That's correct.

8 Q And the 1965 outstanding checks were credited
9 back to income in the 1970.

10 A Correct.

11 Q And the 1966 in the 1971 return?

12 A Right.

13 Q What do you mean by credited back to income?

14 A Okay.

15 Q Can you make it short and uncomplicated?

16 A I will try. When you credit it back you are
17 stating in effect that an error was performed in prior
18 years; that an item was picked up as a payment to a customer
19 in a prior year that it didn't exist, so you are increasing
20 this year's income by that error. It is sort of an adjustment.

21 Q In other words, the tax benefit that the
22 corporation obtained, taking as an expense deduction
23 the outstanding checks in 1963, 1964, 1965 and 1966 were
24 now added on to the income so that additional tax would be
25 paid on it?

EXHIBIT 13, ANNEXED TO AFFIDAVIT OF STEVEN THAL.

STATE OF NEW YORK)
COUNTY OF New York) SS.:

JOSEPH KATZMAN, being duly sworn, deposes and says

1. I am a Certified Public Accountant and a member of the firm of Popper, Katzman & Scheckman with offices at 79 Madison Avenue, New York, N. Y. I make this affidavit to clarify a statement made by me on May 11, 1973 to the Internal Revenue Service.

2. While it is correct that I was informed that adjustments had been made for outstanding checks which had not cleared so as to restore the amount to income, that information was given to me by Sanford Katz and not by Jack Nathan. I do not recall ever discussing the subject of adjusting journal entries for these uncleared checks with Jack Nathan. My discussions on this subject were with Mr. Katz and arose out of his suggestion that only uncleared checks of a certain amount need be adjusted. It was to Mr. Katz that I said that the Examining Agent would make the final determination as to the adjustment based on the facts.

3. After discussion with Sanford Katz about work done by him, I was requested to dictate a notarized statement which he signed and swore to on August 23, 1972. This was just prior to the termination of my activities on behalf of

There
 wasn't
 any
 as
 Katz
 1/1/76
 to
 Katzman

EXHIBIT 13, ANNEXED TO AFFIDAVIT OF STEVEN THAL

Jack Nathan. I was aware of the problem of the uncleared checks and Mr. Katz' previous failure to make adjusting journal entries with respect to them. When the returns were prepared by Mr. Katz, he told both Mr. Nathan and me that he had adjusted for uncleared checks on some basis which would be discussed with Revenue Agent Kerr. Therefore, both Mr. Nathan and I were under the impression that the corporate returns mentioned in that statement reflected some adjustment for uncleared checks but neither of us knew of the exact nature of that adjustment.

Joseph Katzman
Joseph Katzman

Sworn to before me this

11 of January, 1974.

Lillian Zuckerman Leary

ILLIAN ZUCKERMAN LEARY
NOTARY PUBLIC, State of New York
No. 41-7462000
In and for Queens County
Certificate filed in New York County
Commission Expires 12/31/1974

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EXHIBIT 14, ANNEXED TO AFFIDAVIT OF STEVEN THAL.

MORTON L. ROSENTHAL M. D., F. C.
20 EAST 9TH STREET
NEW YORK, N. Y. 10003

TEL 674-2970

To Whom It May Concern
Re: Jack Nathan

Mr. Nathan is under post-op
care for uterine cancer surgery
AND MAY NOT LEAVE OR
RETURN UNTIL NOTED.

M. Rosenthal, MD

RECEIPT MAILED ON REQUEST

EXHIBIT 15, ANNEXED TO AFFIDAVIT OF STEVEN THAL.
AFFIDAVIT

BONITA NATHAN hereby affirms under the penalties of perjury:

1. I am the daughter of Mr. Jack Nathan, the defendant in the matter of United States v. Nathan 75 CR 377. I attended the last day of the trial in the above matter on October 10, 1975, and I was present in the courtroom when the jury returned and advised the Court that it was unable to reach a verdict on the last four counts of the indictment.

2. When the judge excused the jury, after the completion of their deliberations, I immediately proceeded outside the courtroom to listen to any of the comments that the jury might make about their verdict. While standing next to the jurors, waiting for an elevator, a member of the jury, known to me as Mrs. Black, engaged me in conversation and made certain comments which really shocked me. She said, amongst other things, that "...the trial has been keeping me up all week," "...There are some people who are just mean...", "...they just convicted an innocent man", and "...I believe it was the accountant who did it." At that point, the elevator came and the jurors left the floor.

3. During the day, prior to the verdict, I had sat in the courtroom near a Mr. John Kennedy, another observer. While the jury was deliberating, he and I engaged in substantial conversation. When I left the courtroom to listen to the jurors' comments, Mr. Kennedy left the courtroom to talk to the jury. When the elevator came, he entered the elevator together with the jury members.

EXHIBIT 15, ANNEXED TO AFFIDAVIT OF STEVEN THAL

4. Some time after I had re-entered the courtroom, Mr. Kennedy reappeared and said to me, in the presence of my father and Mr. Bender, that he had heard the jury say that they were confused, they did not understand the charts and felt pressured to finish the trial.

5. I regret that I cannot be more precise in my recollection of the specific words used but in my best effort to be factual, I have restricted myself only to that of which I can be absolutely certain.

Bonita Nathan

BONITA NATHAN

Affirmed before me this

17th day of September, 1976

Steven Thal

EXHIBIT 16, ANNEXED TO AFFIDAVIT OF STEVEN THAL.

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cont you return now and continue your deliberations.

(At 4:55 p.m. the jury returned to the jury room to continue deliberating upon their verdict.)

THE COURT: All right, Mr. Wallace, would you mark that as a court's exhibit.

(Note marked Court's Exhibit 9.)

(Recess.)

(Note received at 5:30 p.m.)

(In the robing room.)

THE COURT: As I was leaving the courtroom the last time we had the jury in, on the way upstairs to meet with some gentleman from the Administrative Office, a marshal came to me and said they were having a little trouble with a man who wanted to see his wife who was on the jury, so I said all right, bring the man out here and I will talk to him.

The man did come and he said his wife didn't want to sit on the jury and that it was causing great trouble in the family, or with him any way. The man seemed rather distraught, I thought. The juror is Mrs. Shapiro. She was the one who asked those rather intelligent questions during the trial, so it was my view that she wants to be on the jury. All right, he doesn't like having her on the jury and he was distraught, and I wanted to tell you that

EXHIBIT 16, ANNEXED TO AFFIDAVIT OF STEVEN THAL
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anyway.

MR. BENDER: What happened just a few minutes ago when I went to the men's room he was trying to push through the marshals to go into the jury room and they wouldn't let him. He kept screaming that it's my wife and I have a right to see her and they said you can't talk to a juror

Then she -- I think it was Miss Shapiro -- incidentally, I think Mr. Levine and I have checked the card; she is listed as Miss, not Mrs. She walked out and he started screaming at her, saying that is what you did to me or words to that effect and you are keeping me or something or other, get rid of it. By that time the marshals said you better get off this floor and I thought I better come back and tell Frank Wohl and Alan Levine and Charley Wallack

THE COURT: There is always a new one that happens in these things. The only suggestion is if you gentlemen wanted to agree and you wanted me to excuse her, I would excuse her from the jury, but I won't do it unless you stipulate to it and you take a jury with 11.

MR. BENDER: Not an 11-man jury, Judge.

THE COURT: I know, but you have raised the point.

MR. BENDER: No, I am not asking that she be disqualified, nor am I saying -- I just don't know what the

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EXHIBIT 16, ANNEXED TO AFFIDAVIT OF STEVEN THAL

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1
2 impact of this is. Obviously she could be in favor of the
3 defendant, nobody knows. I just thought I would call it
4 to your attention.

5 THE COURT: The only problem I see in all this
6 is that he did look distraught and I don't know what's
7 the matter with him, but I thought he was distraught and
8 there is a real possibility that, I don't know, if he
9 continues this attitude, he may keep her from coming back
10 tomorrow morning.

11 MR. BENDER: If he does we can always decide
12 tomorrow.

13 THE COURT: Yes, but I am perfectly willing to
14 do that, but I think it would be a great shame, and I think
15 from the defendant's point of view it would be a great shame
16 to have a mistrial and have to go through all this again.

17 MR. BENDER: I have an ill man, too.

18 THE DEFENDANT: I wasn't supposed to come in here
19 today, but I didn't do that because I didn't want any
20 sympathy from the court.

21 THE COURT: I think it would be a great shame from
22 everybody's point of view. What I think I will do,
23 gentlemen, then, tonight, you think about that, but I was
24 just expressing an opinion on all hands, that if because
25 she doesn't show tomorrow I would dearly hope you would go

EXHIBIT 16, ANNEXED TO AFFIDAVIT OF STEVEN THAL

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on with the rest of the jury because I think it would be a shame, the loss of time and effort and also the ability with which you have done this.

MR. WOHL: Your Honor, I share the Court's concern about that very problem and I wonder whether it not be a good idea, in light of that problem, to keep them down a little bit longer and maybe send them home in limousines or something like that.

THE COURT: Who has got the money to do that?

MR. WOHL: I don't know, Mr. Levine tells me it can be done.

THE COURT: Well, you lock up the jury.

MR. BENDER: Also, Mr. Wohl, if she is anxious to meet this husband or whatever he is, you are not going to accomplish anything by preventing her from doing it.

MR. WOHL: But maybe then the jury should be asked whether they would find it convenient to stay down a little bit longer tonight.

THE COURT: I am going to put it up to them again just as I said I was. I am going to say what do you want to do. I always do that anyway, would you like to stay longer tonight?

MR. BENDER: The note indicated to you that they don't want to, they want to go home.

EXHIBIT 16, ANNEXED TO AFFIDAVIT OF STEVEN THAL

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1 THE COURT: I think so. "We the jurors cannot
2 reach a decision."

3 Well, I want to send them home.

4 THE DEFENDANT: I would prefer not to antagonize
5 them.

6 MR. BENDER: She has been a law secretary, so
7 I think she knows her responsibility. I doubt that she
8 won't be back. I think she has some engagement that she
9 has to get to and she wants to go.

10 THE DEFENDANT: I think we ought to send them
11 home.

12 THE COURT: I was as disturbed as you were.

13 MR. BENDER: He asked me several times whether
14 there was any jury around.

15 THE COURT: Did he?

16 MR. BENDER: Yes.

17 THE COURT: Why don't I do that. It is now a
18 quarter of six, but I have gotten this note. I think I will
19 call them in right now.

20 MR. WOHL: Could they at least be asked, your
21 Honor, so that they have an opportunity if she feels, for
22 example, that it will really be a problem coming back
23 because of him being so distraught --

THE COURT: I don't want to raise it with the other

EXHIBIT 16, ANNEXED TO AFFIDAVIT OF STEVEN THAL , 1.)

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2 jurors.

3 MR. WOHL: No, but maybe the question should have
4 been posed again do you want to go or stay?

5 THE DEFENDANT: If they want to go home, I don't
6 want to antagonize the jury.

7 THE COURT: Of course you don't.

8 THE DEFENDANT: If they want to go home, I say let
9 them go home.

10 THE COURT: All right.

11 MR. WOHL: Your Honor, would it make sense to
12 at this point ask them if they do have a partial verdict
13 so that if she doesn't come back tomorrow that is ac-
14 complished?

15 THE COURT: Okay, I will ask them that.

16 MR. BENDER: Your Honor, I think that would be really
17 difficult at this time because since these counts are so
18 inextricably tied --

19 THE COURT: I agree, but I will ask them anyway.
20 I think I know what the answer is, but I don't know what
21 they asked me.

22 THE DEFENDANT: If they reached a verdict now
23 they might not reach the same verdict tomorrow.

24 THE COURT: No, if they reach a verdict it sticks.

25 (In open court; jury present.)

MEMORANDUM OF UNITED STATES IN OPPOSITION TO PETITION
FOR RELIEF UNDER 28 U.S.C. § 2255.

FHW:mf

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK - - -x

JACK NATHAN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

- - - - -x

76 Civ. 4451 (DBB)

MEMORANDUM OF UNITED STATES
IN OPPOSITION TO PETITION FOR
RELIEF UNDER 28 U.S.C. § 2255

Preliminary Statement

Jack Nathan seeks by his petition under Title 28 United States Code Section 2255 to invalidate his conviction on four counts of tax evasion adjudged by this court on December 8, 1975. This memorandum is submitted in opposition to Nathan's petition.

Statement of Facts

Nathan was convicted of four counts of

MEMORANDUM OF UNITED STATES IN OPPOSITION TO PETITION
FOR RELIEF UNDER 28 U.S.C. §2255

tax evasion in violation of 26 United States Code Section 7201 by a jury verdict returned on October 9, 1975. At the trial, he was represented by Louis Bender, Esq. and Judge Richard Baltimore. In the first day of the trial defense and Government counsel notified the Court that Mr. Bender also represented Joseph Katzman, who had done some accounting work for Nathan, and that, although the Government did not intend to call Katzman as a witness in its case in chief, Katzman was a potential Government rebuttal witness. Mr. Bender proposed that any potential conflict of interest problem could be avoided by arranging for Judge Baltimore to cross-examine Katzman in the event that he testified as a Government witness. Nathan then acknowledged, in response to the Court's questions, that he understood and accepted this arrangement and that he waived any claim he might have based on this potential conflict of interest. (Tr. hph 76-77). Since Katzman never testified, this arrangement was never activated.

MEMORANDUM OF UNITED STATES IN OPPOSITION TO PETITION
FOR RELIEF UNDER 28 U.S.C. §2255

Shortly after the trial new counsel, Nathan Lewin, Jamie S. Gorelick and Miller, Cassidy, Larroca and Lewin, Esqs. appeared for Nathan and filed voluminous post-trial motions. In December 8, 1975 the Court denied those motions and sentenced Nathan to concurrent terms of nine months' imprisonment and fines of \$10,000 on each of the four counts on which he had been convicted.

On June 16, 1976, the Court of Appeals affirmed Nathan's conviction, rejecting Nathan's attacks on the sufficiency of the evidence and the Court's evidentiary rulings and charge to the jury.

On November 1, 1976, the Supreme Court denied certiorari.

In October 7, 1976, the day Nathan was scheduled to begin serving his sentence, a third battery of attorneys, Thal & Youtt, Esqs. filed a petition, pursuant to 28 United States Code Section 2255, urging two points never before raised in the District Court or in the Court of Appeals: (1) That Nathan had been denied effective assistance of counsel at his trial because an alleged conflict of interest on the part of Mr. Bender between

MEMORANDUM OF UNITED STATES IN OPPOSITION TO PETITION
FOR RELIEF UNDER 28 U.S.C. §2255

Nathan and Katzman and (2) that a juror had been overheard to say that the jury had convicted an innocent man. In his petition Nathan also refers to an equivocal lie detector test which he underwent after the trial and an operation on his eye shortly before the trial. Of course, he did not seek an adjournment of the trial, and we do not understand that he now seriously urges either of these matters as a basis for granting his petition.

In October 12, 1976, this Court denied Nathan's motion for an adjournment of his surrender date. In October 13, 1976 the Court of Appeals affirmed that ruling on jurisdictional grounds, but gave Nathan an interim extension of time to permit him to seek relief in the Supreme Court. Justice Marshall thereafter stayed Nathan's surrender until his petition could be considered by the full Court. In November 1, 1976, the Supreme Court denied Nathan's petition for certiorari, as well as his motion to vacate the Court of Appeals judgment. The stay of surrender ordered by Justice Marshall having been dissolved, Nathan then moved in the

MEMORANDUM OF UNITED STATES IN OPPOSITION TO PETITION
FOR RELIEF UNDER 28 U.S.C. §2255

Court of Appeals for an additional delay of his surrender. In November 9, the Court of Appeals orally denied that motion. Nathan surrendered on November 10, 1976.

ARGUMENT

I. Nathan's Non-constitutional Claim Is Not Cognizable Under § 2255 Because Nathan Failed to Raise It At Trial Or On Direct Appeal.

The law is clear that the Court may reject a collateral attack not asserted at trial or on direct appeal if it raises no constitutional or jurisdictional issues. See Stone v. Powell, 5313, 5316 n. 10 U.S. (44 USLW/ July 6, 1976); Davis v. United States, 417 U.S. 333, 345 n. 15 (1974); United States v. Laschiavo, 531 F.2d 659 (2d Cir. 1976); Sunal v. Large, 332 U.S. 174 (1947).

Here Nathan's claim of the overheard comment of a juror is not of constitutional moment, and his tardiness in raising the point should bar any consideration of it. Even besides the lack of merit in the claim, it is undoubtedly much more difficult to investigate now than it would have been on the last day of the trial, when the defense claims it

*For a discussion of the lack of merit in this claim, see the Memorandum of the United States in Opposition to Adjournment of Nathan's Surrender Date, pp.8-11.

MEMORANDUM OF UNITED STATES IN OPPOSITION TO PETITION
FOR RELIEF UNDER 28 U.S.C. §2255

occurred. Consequently, the Court's denial of this claim based on the defense's failure to raise it at trial or on direct appeal would be an appropriate exercise of the Court's discretion.

II. Nathan's Deliberate Bypass At
Trial of Any Claim of Conflict of
Interest Bars His Raising Such A
Claim Now.

Although failure to raise an issue on direct appeal appears to preclude § 2255 relief only on non-constitutional claims --see United States v. Loschiavo, supra., and cases therein cited-- even a constitutional claim may be barred from §2255 litigation if it was deliberately bypassed at trial. Francis v. Henderson U.S. (44 USLW 4620 May 3, 1976), Estelle v. Williams, U.S. (44 USLW 4609, May 3, 1976); Henry v. Mississippi 379 U.S. 443, 451-52 (1965); Fay v. Noia, 372 U.S. 391, 433-34 (1963); United States v. West, 494 F.2d 1314 (2d Cir. 1974); Zovluck v. United States, 448 F.2d 339 (2d Cir. 1971).

Here the record presents substantial evidence of Nathan's deliberate bypass of the conflict of interest point. At trial Mr. Bender announced that he

MEMORANDUM OF UNITED STATES IN OPPOSITION TO PETITION
FOR RELIEF UNDER 28 U.S.C. §2255

and Nathan had previously discussed the matter and then in the presence of Nathan and his other counsel, Judge Baltimore*, again stated the potential conflict. Neither the defendant nor his other counsel voiced any hesitation about going ahead. Rather, Judge Baltimore agreed to cross-examine Katzman if he appeared, and the defendant waived any objection to the arrangement proposed by his counsel and approved by the Court. (Tr. hph 74-77).

Given the remoteness of any possibility of conflict and the solution agreed upon by all counsel and Nathan, the Court's inquiry satisfied the requirements later announced by the Second Circuit in United States v. Carrigan, Dkt. No. 74-2056 (November 3, 1976, slip. op. 389); and Nathan's and Judge Baltimore's waiver of the issue constituted a deliberate bypass of *Judge Baltimore never announced at the trial as he now claims in his affidavit, that he was appearing as Nathan's friend rather than as co-counsel. Indeed, the record is clear that he voiced no objection to cross-examining Katzman if the need arose. Judge Baltimore also claims in his affidavit that he and Nathan were told that Mr. Bender represented another of Katzman's clients, not Katzman. The record of colloquy with the Court reveals that Nathan and Judge Baltimore were clearly told then, if not before, that Mr. Bender also represented Katzman. The trial transcript also disproves Nathan's statement in his affidavit, "Neither of us [Nathan or Judge Baltimore] had the slightest idea before or during the trial that Mr. Bender represented Mr. Katzman." (Nathan affidavit, ¶¶ 10).

MEMORANDUM OF UNITED STATES IN OPPOSITION TO PETITION
FOR RELIEF UNDER 28 U.S.C. § 2255

the issue thereby precluding the collateral attack
Nathan now presses.

III. Nathan's Claim of Conflict
of Interest is Without Merit.

In sum Nathan now seeks to reshape the trial record in order to transform an insignificant and speculative potential conflict between himself and Katzman into a major item justifying the granting of a new trial. As we explained in our Memorandum in Opposition to Adjournment of Nathan's Surrender Date, Katzman was a very minor figure in the tax evasion scheme which led to Nathan's conviction. Even at this late date Nathan has yet to make any responsible allegation that Katzman's testimony would have been significant in this case either for the defense or for the Government.* While Nathan complains about the

* Since only Nathan knows what he would have said if he had testified at the trial, we cannot evaluate the significance of Katzman's possible rebuttal testimony if any. Nathan's trial notes attached to his affidavit indicate that Nathan wanted Katzman to testify that Katz, Nathan's accountant, had told Katzman that Nathan's troubles were all Katz' fault. Since Katz so testified at the trial, Katzman's testimony on this point was unnecessary and indeed would have been inadmissible.

MEMORANDUM OF UNITED STATES IN OPPOSITION TO PETITION
FOR RELIEF UNDER 28 U.S.C. §2255

decisions at trial to call no defense witnesses, he makes no substantial allegations that the decision to call no defense witnesses related in any way to Mr. Bender's representation of Katzman. Certainly, the decision not to call Mr. Mate- - whose affidavit revealing any potential defense testimony is conspicuously absent-- had nothing to do with Katzman or Mr. Bender's joint representation. Although Nathan tells us that Mr. Bender told him "not to do his own surgery" he does not allege that anyone other than himself decided that he would not testify in his own defense. Nor does Nathan state in any significant detail the conversations between himself and Mr. Bender on the question of whether Nathan or any other witnesses should testify for the defense. Nathan has therefore failed to allege facts which would distinguish this case from the multitude of cases in which disappointed defendants criticize the trial tactics of defense counsel. See United States v. Gonzalez, 321 F.2d 638 (2d Cir. 1963); United States v. Wisniewski, 478 F.2d 274 (2d Cir. 1973).

MEMORANDUM OF UNITED STATES IN OPPOSITION TO PETITION
FOR RELIEF UNDER 28 U.S.C. §2255

Although Nathan's motion papers make out no case for collateral relief, the Government submits that it is not entirely clear that "the motion and the files and records of the case conclusively show that ...[Nathan] is entitled to no relief", as § 2255 requires in order to justify denial of the application without a hearing. Accordingly, it seems that the most efficient use of judicial resources would be to grant Nathan a hearing limited to the issues of Mr. Bender's alleged conflict of interest and Nathan's allegation of denial of his Sixth Amendment right to counsel.

Conclusion

The Court should grant Nathan a limited hearing after which, in all likelihood, the petition should be denied.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York
Attorney for United States of
America.

FRANK H. WOHL,
Assistant United States Attorney
Of Counsel

LETTER OF TRIAL ATTORNEY TO PETITIONER, DATED DECEMBER 30, 1975.

LOUIS BENDER

COUNSELOR AT LAW

LOUIS BENDER
SANDOR FRANKEL

CABLE: "GOLELLN"

225 BROADWAY
NEW YORK, N. Y. 10007

BARCLAY 7-8000

December 30, 1975

Mr. Jack Nathan
Nathan, Nathan & Nathan Ltd.
167 Third Avenue
New York, New York 10003

Dear Jack:

I received your letter of 12/24/75 and I am happy that you're happy (as if anyone can be happy about this situation) that you now have the memo you wanted.

With respect to your request for copies of "your communications and memos to the government regarding this" and any communication "concerning the erasing of my tape by the government", there are none such. You will recall that as part of our motion to dismiss the indictment it was your intention to testify that the memo did not reflect completely what had occurred when you were with Mr. Putzel. We did not intend to alert them beforehand to that fact. As for your claim that the tape returned by Jeff Harris, Assistant United States Attorney, to me was erased in some particulars, I did not convey that claim of yours to the Government, but again had to leave that claim of yours to your testimony at any hearing on the motion to dismiss.

Please get in to me as soon as you can the stipulation substituting Mr. Lewin as your attorney, which I have to file in the Court of Appeals.

With best wishes on the appeal,

Sincerely,

Louis Bender

LB/mr

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TRANSCRIPT.

mubr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

JACK NATHAN, :

Plaintiff-Petitioner, :

-against- : 76 Civ. 4451

UNITED STATES OF AMERICA, :

Defendant. :

----- x

Before:

HON. DUDLEY B. BONSAI,

District Judge

New York, December 1, 1976
Room 618 - 2:00 p.m.

APPEARANCES

THAL & YOUTT, Esq.,
Attorneys for Plaintiff-Petitioner

ROBERT B. FISKE, JR., Esq.,
United States Attorney for the
Southern District of New York,

By: FRANK H. WOHL, Esq.,
Assistant United States Attorney

- - -

2 (Case called.)

3 MR. THAL: I would like to call as the first
4 witness Mr. Louis Bender.

5 L O U I S B E N D E R, a witness called on behalf
6 of the Petitioner, having been first duly sworn,
7 testified as follows:

8 DIRECT EXAMINATION

9 BY MR. THAL:

0 Q Please give us your name, the name of your
1 law firm, your office address, please.

2 A My name is Louis Bender. I practice myself
3 with an associate, Sandor Frankel at 225 Broadway in the
4 City and State of New York.

5 Q You were trial counsel for Jack Nathan in
6 the matter of United States v. Jack Nathan?

7 A That is correct.

8 Q When were you retained by Mr. Nathan?

9 A In the year 1974, 1974, I believe, in the spring
10 of that year.

11 Q Did you ever represent one Joseph Katzman?

12 A I did.

13 Q Can you tell us when you were retained by
14 Mr. Katzman?

15 A I believe in or around October of 1974.

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Bender-direct

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2 THE COURT: How did that come about,
3 Mr. Bender?

4 THE WITNESS: How did what come about, your
5 Honor?

6 THE COURT: Your being retained by Mr. Katzman
7 in October, 1974.

8 THE WITNESS: I was recommended to Mr. Katzman
9 in connection with a matter where he felt the need of
0 counsel, and that is when Mr. Katzman came in to see me
1 to discuss the matter with me.

2 Q You said that was October, 1974, which
3 would put it some months after you were retained by
4 Mr. Nathan?

5 A I believe that is correct.

6 Q Now, Mr. Bender, I am going to refer to the
7 transcript of the trial in U.S. v. Nathan.

8 A I am well aware of that. I read it over.
9 I know --

10 May I, your Honor?

11 THE COURT: Go ahead.

12 THE WITNESS: I know, I think at the time
13 we had our conference before Judge Bonsal I did indicate
14 that my recollection was that I had been retained by Mr.
15 Katzman prior to being retained by Mr. Nathan. I have since

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Bender-direct

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2 checked my notes in my file and in preparation for this
3 meeting and I find that I was mistaken at the time that
4 I had the conference with Judge Bonsal as to that
5 fact.

6 THE COURT: Your recollection is now
7 definitely more precise and more correct than it was at the
8 time of the conference during the trial?

9 THE WITNESS: Yes.

10 Q Could you tell me when your engagement with
11 Mr. Katzman was completed, if it has been completed?

12 A Well, I don't know if I can answer that
13 question, because one never knows about how completely
14 terminated some of these matters are. But I would say to
15 the best of my knowledge it was practically finalized in
16 either early this year or late last year. I would have to
17 check my file to really get through that date.

18 Q Can we, at least, establish that during the
19 time that your trial in U.S. v. Nathan was going on, you
20 were still counsel to Mr. Joseph Katzman?

21 A That is true.

22 Q Can you tell me in a general way what was the
23 nature of Mr. Katzman's case or matter? I emphasize,
24 in a very general way.

25 A I represented him as an attorney in a matter

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Bender-direct

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2 that I don't feel free to disclose in view of the attorney-
3 client privilege.

4 MR. THAL: Your Honor, may I ask for a
5 ruling on this? I have certain support for the proposition
6 that the nature of the representation in a most general
7 way, for example, is proper, such as the purchase of real es-
8 tate, a commercial matter, a criminal matter, a tax matter,
9 just that. I will not proceed beyond that.

10 THE COURT: Was it proceeding before the
11 Internal Revenue Service?

12 THE WITNESS: Yes, it was, your Honor. I take
13 it that it is a direction from you that I answer that
14 question?

15 THE COURT: I asked you the question and you
16 have answered it.

17 THE WITNESS: Well, the only thing, I want to
18 make sure that it is a direction from you, because I have
19 that obligation.

20 THE COURT: You can treat it as a direction.

21 Q At any time during your representation of
22 Mr. Jack Nathan, did Mr. Nathan tell you he wanted to take
23 the witness stand at the trial?

24 A I believe so.

25 Q Did there ever come a time when you advised him

1
2 against taking the witness stand?

3 A Yes.

4 Q Did there come a time when you advised him it
5 was his absolute right to take the witness stand as a
6 matter of law?

7 THE COURT: Let us not get into the matter of
8 law. The witness' testimony is that Mr. Nathan did ask
9 him to take the witness stand and he advised against it.

10 THE WITNESS: Well, I think the question
11 was at any time during the trial and Mr. Nathan said that
12 he wanted to take the stand, and I said yes.

13 Q Did Mr. Nathan tell you at any time that he
14 wanted to have Mr. Joseph Katzman called as a witness at his
15 trial?

16 A No, I don't think he did.

17 Q In other words, according to your best recol-
18 lection --

19 THE COURT: Don't say another word. He answered
20 the question, he said he didn't think he did.

21 MR. THAL: May I inquire further?

22 Q Your best recollection at this point in time
23 is that Mr. Nathan never indicated to you in words or in
24 writing that he wanted Mr. Joseph Katzman to be a witness
25 or had expected you to call Mr. Katzman as a witness at the

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Bender-direct

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trial? Am I stating correctly what he said?

A You are stating it correctly. That is my
recollection.

(Continued on next page.)

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Q Am I stating correctly what you said?

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A You are stating it correctly. That is my

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recollection.

5

Q Do you recall Mr. Nathan having kept a trial

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notebook in which he made notes throughout the course of

7

the trial?

8

A No, I do not.

9

Q Did he ever show you such a notebook?

10

A No. I don't think so.

11

THE COURT: At least you don't recall it?

12

THE WITNESS: I certainly don't, your Honor.

13

Q Did you ever advise Mr. Nathan that you thought

14

Mr. Katzman would be called as a witness in the Nathan

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trial?

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THE COURT: Is the question -- I am not clear

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I understand the question. Were you advised that the

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government might call Mr. Katzman?

19

MR. THAL: No. I am asking did Mr. Bender

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ever advise Mr. Nathan that Mr. Bender expected to call

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Mr. Katzman as a witness at the trial?

22

THE COURT: Not in those words, Mr. Thal.

23

Q Could you tell me what it was that you may

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have said in your own words?

25

A I believe when Mr. Nathan disclosed to me

1 his relationship with Mr. Katzman with respect to the
2 transactions involved in the case, I told him that on the
3 basis of what Mr. Nathan said, that Mr. Katzman might make
4 a very good witness for him.
5

6 Q And you changed your mind at some subsequent
7 point in time, is that correct?

8 A I certainly did.

9 Q May I ask you why did you decide not to call
10 Joseph Katzman as a witness?

11 THE WITNESS: May I inquire of the Court at
12 this moment? I am in an area now where I have advised
13 counsel who has discussed this with me before that I
14 feel that there is an attorney-client privilege between
15 Mr. Nathan and myself, and that unless directed by the
16 Court --

17 THE COURT: I think if there is such a
18 privilege with Mr. Nathan, that it belongs to Mr. Nathan,
19 and does Mr. Nathan wish him to answer that question?

20 MR. THAL: Mr. Bender, and your Honor, we
21 are prepared to waive the privilege in a limited manner
22 as to this question, as to all relevant testimony on this
23 question.

24 THE COURT: I think there is a problem about
25 partial waivers here. I don't see why Mr. Bender can

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Bender-direct

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2 waive the privilege in part and not in other parts.

3 He either is going to waive it or he isn't.

4 MR. THAL: I believe the rule of law, your
5 Honor. May I cite some cases, Second Circuit, that a waiver
6 is to all relevant parts in these kind of cases. It is not
7 a blanket waiver.

8 THE COURT: You better find out from Mr.
9 Nathan whether he is prepared to waive the principle.

10 MR. THAL: Is the question a complete
11 waiver or waiver as to relevant parts?

12 THE COURT: Who is going to decide the
13 relevant parts? I am going to decide that.

14 MR. THAL: That is correct, your Honor.

15 THE COURT: You better ask him whether he
16 is prepared to because he is not going to decide which is
17 relevant and which is not.

18 (Discussion off the record.)

19 MR. NATHAN: Your Honor, may we have a confer-
20 ence?

21 THE COURT: Sure.

22 MR. THAL: With the understanding that
23 it is limited to what your Honor decides is relevant to the
24 question and a complete response to it, Mr. Nathan is
25 prepared to waive his privilege in this area.

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Bender-direct

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2 MR. WOHL: Your Honor, the government would
3 object to any waivers limited to particular questions.
4 Counsel for Mr. Nathan, for example, has already asked
5 the witness whether Mr. Nathan ever wanted to be a witness
6 in his own behalf. Mr. Nathan has already filed an
7 affidavit with the Court discussing conversations with
8 Mr. Bender concerning conflict of interest, testifying
9 himself at the trial, calling other defense witnesses.

10 The government would object certainly to any
11 piecemeal waivers limited to a particular question phrased
12 by counsel for Mr. Nathan.

13 THE COURT: No. I think as I understand it
14 I am asking if Mr. Nathan is waiving. He's got to waive his
15 complete privilege, and if the question is not considered
16 to be relevant either by you or by Mr. Thal, I will rule
17 on it, but it's got to be a complete waiver.

18 MR. THAL: It's a complete waiver as to all
19 relevant parts.

20 THE COURT: Do you so make a complete waiver?

21 MR. THAL: Your Honor --

22 THE COURT: Apparently he doesn't agree with
23 you. You better talk to him.

24 MR. NATHAN: Really I don't understand the
25 situation.

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Bender-direct

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2 (Discussion off the record.)

3 MR. THAL: I am sorry for the interruption,
4 your Honor. Again, we are not trying to limit Mr. Bender
5 or the government in a piecemeal fashion by asking a
6 question and --

7 THE COURT: Is he making complete waiver of
8 the attorney-client privilege?

9 MR. THAL: As to the question and relevant
10 answers, yes.

11 / THE COURT: What question?

12 MR. THAL: The question I asked and all
13 information Mr. Bender may have to give that is rele-
14 vant.

15 THE COURT: That is not sufficient.

16 MR. THAL: We would not waive, for example --
17 if Mr. Nathan had said to him, "I hit my wife 10 years
18 ago," that certainly would not be relevant.

19 THE COURT: Please let us not get beyond.
20 If he wants to waive the privilege, then I can ask Mr. Bender
21 to answer. If he is not going to permit the answer,
22 I am not going to.

23 MR. THAL: Are you asking for a complete
24 waiver of all aspects of the attorney-client privilege?

25 THE COURT: Regarding this particular 2255

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Bender-direct

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2 the facts as far as I can, but I can understand Mr. Bender's
3 position. He is a lawyer, and he was representing
4 Mr. Nathan, and unless there is a waiver of the privilege
5 as to all matters which have been brought up in this
6 2255 proceeding, I am not going to require Mr. Bender
7 to answer.

8 MR. THAL: Again, your Honor --

9 THE COURT: That's a ruling. Please don't
10 argue with it. I want to get through. Go ahead. Ask
11 your next question.

12 MR. THAL: You are putting a burden on us.
13 When you say everything relevant to the 2255, that is so
14 broad. It goes beyond the cases.

15 THE COURT: I made the ruling, and so proceed
16 on that basis.

17 MR. THAL: I object to the ruling.

18 THE COURT: All right.

19 MR. THAL: Your Honor, I will proceed.

20 A I will go back, Mr. Bender, and ask the
21 question that I asked before and that I withdrew.

22 Did you advise Mr. Nathan at any time
23 that you would not call Mr. Joseph Katzman?

24 MR. WOHL: Objection. Have you com-
25 pleted the question?

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Bender-direct

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MR. THAL: I think so.

MR. WOHL: I object on the same ground.

THE COURT: You stand on your privilege?

THE WITNESS: Yes.

MR. THAL: I objected to your Honor's ruling
but we are now agreeing to waive the privilege. We have
no choice.

THE COURT: We have what?

MR. THAL: No choice.

THE COURT: Choice but what?

MR. THAL: But to proceed with a waiver.

THE COURT: But Mr. Nathan hasn't waived the
privilege. Come on. Let's move along.

MR. THAL: I indicated to the Court a moment
ago that we were prepared now.

THE COURT: You said that Mr. Nathan didn't.
You had a whole big conference back there, and I don't know
what you are talking about. If there is going to be
a waiver and Mr. Bender answers any questions, I want
Mr. Nathan to waive the attorney privilege as to any matter
raised in this proceeding with respect to Mr. Bender.

(Discussion off the record.)

MR. THAL: Can I make a statement on his
behalf, your Honor?

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Bender-direct

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THE COURT: Is he waiving or not?

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MR. THAL: He is prepared to waive subject

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to the objection to your Honor's ruling which I made.

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THE COURT: Of course you objected to it.

6

You waive your client-attorney privilege with respect

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to Mr. Bender as to all matters raised in this 2255 pro-

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ceeding?

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MR. NATHAN: Yes, sir, providing he tells

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the truth on it, sir.

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THE COURT: There is no provision.

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It has got to be an absolute waiver.

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MR. NATHAN: Okay, thank you, sir.

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THE COURT: You make an absolute waiver?

15

MR. NATHAN: Yes, sir.

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THE COURT: Then you can ask him that last

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question.

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Q

Did you ever advise Mr. Nathan against having

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Joseph Katzman called as a witness?

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A

I did.

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Q

May I ask you why?

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A

Because when I interviewed Mr. Katzman in

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September I believe of 1974, having learned that he had

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submitted -- or September 1975 I believe -- having learned

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that he had submitted an affidavit to the Internal Revenue

2 Service, Mr. Katzman advised me of what he had told the
3 Internal Revenue Service, what his involvement was in the
4 matters in which Mr. Nathan had originally consulted with
5 him, and retained him, and based upon the information that
6 he gave me at that time and the information contained
7 in his affidavit to the Internal Revenue Service, I felt
8 his testimony would have been disastrous to Mr. Nathan's
9 case on which he was on trial. Particularly with respect --

10 THE COURT: You have answered. I don't think
11 you need to go through all these details.

12 Q Did Mr. Nathan at any time request that you
13 call Mr. Theodore Mate as a witness at the trial?

14 A Mr. Nathan never requested me to call Mr. Mate.
15 He asked me whether I intended to call Mr. Mate.

16 Q How did you answer that?

17 A I told him I had spoken with Mr. Mate, and that
18 Mr. Mate did not offer in my opinion any substantial evi-
19 dence which would be material on the issues in the case and
20 which would be helpful to Mr. Nathan's defense.

21 Q When was the first time that you disclosed
22 to Mr. Nathan that you represented Mr. Joseph Katzman?

23 A My recollection of the date is not too precise.
24 I do believe it was some time shortly prior to the commence-
25 ment of the trial before Judge Bonsal.

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2 Q When you say shortly, can you define it any
3 more precisely than that?

4 A Maybe a week or a week or two.

5 Q Could it have been less than a week?

6 A It could have been.

7 Q Could it have been the night before the
8 beginning of the trial?

9 A No.

10 Q Was there anyone else present when you made this
11 disclosure to Mr. Nathan for the first time?

12 A I believe Mr. Sandor Frankel of my office was
13 present.

14 Q Was Mr. Baltimore present?

15 A I don't remember.

16 Q Prior to the trial did you learn that Mr.
17 Katzman, if he had been called as a witness, would con-
18 tradict statements or facts told to you by Mr. Nathan?

19 A Yes.

20 Q Did you ever discuss with Mr. Katzman what we
21 shall refer to as difficulties with the IRS since we
22 won't try to go further into that area? Did you ever
23 discuss those difficulties with Mr. Wohl of the U.S.
24 Attorney's office?

25 A I am afraid I can't answer that question

2 in the form in which it is put. Are you referring to the
3 specific details of Mr. Katzman's investigation?

4 Q Let me preface it with this comment.

5 I understand from an earlier ruling and interpretation
6 of Judge Bonsal that we have learned this afternoon
7 that Mr. Katzman had what I will call difficulty with the
8 IRS. I have not proceeded to ask --

9 THE COURT: I didn't say anything about
10 difficulty with the IRA. It was in connection with an
11 IRS proceeding, and that is all I said.

12 MR. THAL: I am sorry, your Honor.

13 THE COURT: Please don't keep bringing up
14 these adjectives.

15 MR. THAL: I apologize. I misquoted you.

16 Q A matter involving an IRS proceeding.

17 My question to you now is did you discuss that matter
18 involving Joseph Katzman with Mr. Frank Wohl of the United
19 States Attorney's office?

20 THE COURT: When?

21 MR. THAL: At any time.

22 A That matter?

23 Q The other matter. Not the matter of
24 United States v. Nathan.

25 A I did call Mr. Wohl and advised him prior to

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Bender-direct

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to the time we conferred with Judge Bonsal about this
possible conflict with Mr. Katzman, and I mentioned
Mr. Katzman's name. Is that what you are asking me?

Q That's part of it. Other than in the context
of the matter of United States v. Nathan, aside from that
context, did you discuss the matter of Mr. Katzman and
his IRS proceeding with Mr. Wole at any other time?

A No.

Q Did you discuss it with any other member
of the United States Attorney's office for the Southern
District of New York, again, other than in the context
of United States v. Nathan or its impact on that?

A No.

Q Did you discuss the Katzman IRS proceeding with
any member of the Intelligence Division of the Internal
Revenue Service?

A Would you repeat that question?

(Record read.)

A I have to decline to answer that on the ground
of attorney-client privilege.

THE COURT: I sustain the object.

MR. SHAL: I don't think that is privileged.

It is a conversation.

THE COURT: I sustained it. Let us go ahead.

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MR. THAL: Again, may I just have it on the record that I do not have to object to each.

THE COURT: That is right.

MR. THAL: It will be automatic.

THE COURT: All right.

MR. THAL: Thank you.

Q Can you tell me, Mr. Bender, how Mr. Katzman's IRS proceeding or matter on which you represented him was resolved, just generally.

THE COURT: I will sustain the objection. I don't see that makes any difference.

This is coming up on a conflict of interest.

MR. THAL: Your Honor, on terms of a conflict of interest, the effect that what happened in Mr. Nathan's case that it may have had on Mr. Katzman's case is crucial.

THE COURT: What do you mean?

MR. THAL: Let us take the example --

THE COURT: What do you mean by that?
There is no relationship between the two.

MR. THAL: We don't know that at this point.

THE COURT: No.

MR. THAL: There could have been, for example, an arrangement whereby cooperation by one individual could

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Bender-direct

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have helped him in terms of the other case. That is possible, your Honor. I think I am entitled to inquire into that.

THE COURT: You are suggesting here instead of a conflict of interest, you are saying to Mr. Bender that he did his client in because he had some advantage in some Katzman proceeding?

MR. THAL: I am not suggesting that. I am asking the question --

THE COURT: I am not going to let you ask it.

Q Did you, Mr. Bender, represent Mr. Katzman when he made either of the two affidavits which he gave to the Internal Revenue Service regarding Mr. Jack Nathan?

A No, I didn't. At least I don't believe I did. Could you tell me when the dates of those were?

Q Yes, I can. One of them was dated January 11, 1974, and the other one May 11, 1973.

A No, I didn't.

Q Did Mr. Frankel of your office or your associate, Mr. Frankel, did he represent Mr. Katzman in either of those affidavits?

A No, he did.

Q Did any other associate of counsel represent Mr. Katzman at that time?

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Bender-direct

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A You mean associate of mine?

Q Yes. Any other counsel associated with you.

A No. None.

Q When did you first learn that Mr. Katzman had given an affidavit to the Internal Revenue Service, one or more affidavits?

A I am not sure of the exact date, but I think it was about time I received the file from Mr. Nathan's previous attorney, Jay Goldberg, and that would have been some time I think in 1975.

Q I understood that you were retained by Mr. Nathan about the spring of 1974. I think that's what you told us earlier.

A I believe around there, yes.

Q And you did not find out about the Katzman --

THE COURT: He has answered the question.
Don't argue with him.

MR. THAL: I am just trying to straighten out the timing. There is a year's hiatus there.

Q You told us before, Mr. Bender, that you felt the testimony of Mr. Katzman would be damaging, referring to this IRS affidavit, or one of them. I am speaking now of the affidavit of May 1973, the long affidavit.

MR. THAL: With your Honor's permission,

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2 it has been annexed to our papers in this matter as
3 Exhibit 13, and I sent in a typed transcript as it was quite
4 difficult to read to the Court and to Mr. Wohl I think
5 last week. I would refer the Court to Exhibit 13 to our
6 petition.

7 THE COURT: All right.

8 MR. THAL: May I just use this to refresh
9 his recollection.

10 THE COURT: Sure.

11 Q There is a typed transcript, just for ease
12 of reading.

13 (Pause to read.)

14 (Record read.)

15 A I said including. I believe I said
16 that what he told me plus what was contained in his affi-
17 davit given to the Special Agent May 11, 1973.

18 Q Is there any particular part of that affi-
19 davit that gave you the most concern in making your
20 evaluation or determination that Mr. Katzman might be a dam-
21 aging witness?

22 A Yes.

23 Q Could you tell us what that was?

24 A In particular the statement he made to the
25 Internal Revenue Service on the third page of this copy you

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Bender-direct

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showed me which deals were the amended and delinquent returns that were filed during the course of the special agent's investigation wherein the amended and corporate returns were changed from a Sub Chapter S status which was an 1120s to an 1120 which is a standard corporation income tax return and the reasons why that was done.

Q Did this statement from Mr. Katzman differ substantially from the version of the relevant facts that Mr. Nathan had previously advised you of, or advised you of at any time I should say?

MR. WOHL: I will object, your Honor, on the ground that it is leading. WE haven't brought out from this witness what the version Mr. Nathan gave was. .

THE COURT: I think the issue really is Mr. Bender has been explaining why he advised Mr. Katzman not be called, and I think he has answered that question, and I don't quite see that we need go any further on that.

MR. THAL: I am trying to establish if the reason was grounded on something Mr. Katzman told him or Mr. Nathan told him.

THE COURT: He has answered the question as far as I can see.

MR. THAL: Let me perhaps try to rephrase the question.

2 Q Did Mr. Nathan ever give you a different
3 version of the Sub Chapter S facts from those given by Mr.
Katzman in this affidavit?

5 A Subsequent to the time that I spoke with
6 Mr. Katzman and reviewed with Mr. Katzman the statements he
7 had given to the Internal Revenue Service.

8 Q Did they disagree on who it was that made the
9 decision to backdate the corporate documents?

10 MR. WOHL: I am going to object to
11 this. I think if Mr. Thal is seeking to draw from
12 Mr. Bender what it was that Mr. Bender thought was the
13 disaster that could be evoked by putting Mr. Katz on the
14 witness stand, the question should be what disaster did you
15 foresee. It shouldn't be this series of limiting -- of lead-
16 ing questions to his own witness.

17 THE COURT: Okay, subject to that, I don't
18 know about the disaster. Have you got anything to add as
19 to why you didn't recommend that Mr. Katzman be called
20 at this trial?

21 THE WITNESS: Yes, your Honor. Mr. Katzman's
22 statement to the Internal Revenue Service brought into fo-
23 cus a collateral issue in this case relating to the motive
24 for which there was a change in the type of tax return
25 that was filed.

2 THE COURT: You mentioned that. You mean the S?

3 THE WITNESS: Yes, and since that involved a
4 motive attributed by Mr. Katz to Mr. Nathan which could have
5 imputed a fraudulent intent to him on a matter which was
6 collateral to the issue before this court, I felt that for
7 Mr. Nathan's interests that I should do everything I could
8 to exclude it.

9 THE COURT: All right.

10 THE WITNESS: Particularly since the
11 government, the United States Attorney's office, had brought
12 that matter up to me on several occasions and I had been
13 alerted to it by them.

14 Q Did Mr. Nathan advise you prior to the trial that
15 it was Mr. Katzman's idea to backdate those corporate
16 documents?

17 A Yes.

18 Q In other words, Mr. Nathan gave you a version
19 of the facts that differed from the version that you
20 received from Mr. Katzman?

21 A I don't recall that Mr. Katzman said anything
22 other than that Mr. Nathan had told him he had the proper
23 documentation to merely show a change of ownership which
24 Katzman said Mr. Nathan would require in order to disqual-
25 ify him from filing an 1120S.

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Bender-direct

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MR. THAL: Could I have the answer read back
to me?

(Record read.)

A Does that answer your question?

Q Is it a fact, Mr. Bender, that Mr. Katzman
put the blame on Mr. Nathan for conceiving of the idea
of backdating the corporate documents?

A In substance, yes.. I mean if they were.
He didn't know.

Q If they were. And Mr. Nathan on the other
hand in substance put the blame on Mr. Katzman for conceiv-
ing of the idea of backdating the corporate documents?

A That is correct.

Q Were you aware during the trial that there
was a disagreement between Mr. Katz's testimony, Sanford
Katz' testimony, and Mr. Katzman's affidavit as to who
worked out the theory of writing off the stale checks over
a 5-year period?

A Yes.

Q You explored this with Mr. Katz on cross
examination, did you not?

A Yes.

Q Do you feel that your representation of
Mr. Katzman may have influenced the nature of the manner

1 in which you cross examined Mr. Katz on that disagreement?

2 A No. None whatever.

3 Q You did not point out to Mr. Katz that Mr.
4 Katzman's affidavit totally disagreed with Mr. Katz'
5 testimony. Is that correct?

6 Q No, I did not.

7 Q Could you tell me why?

8 A It was my function to put Mr. Nathan in the
9 best light, and it seemed to me that I tried to accomplish
10 that although the jury may not have thought so, when I brought
11 out that it was Mr. Nathan's wish to wish Mr. Katz
12 testified that he had wanted all of the outstanding checks
13 picked up in the amended return which Mr. Katz said Mr.
14 Katzman failed to tell him to do.

15 Q Did Mr. Katzman advise you during your conference
16 with him regarding Jack Nathan that Sanford Katz had admitted
17 to Mr. Katzman's errors in preparing the tax returns and
18 the books of Nathan, Nathan & Nathan, Ltd.?

19 A I am not sure, Mr. Thal. If I could look
20 at my notes, I might be able to refresh my recollection
21 of whether Mr. Katzman did tell me that.

22 Q Do you have those notes here today?

23 A I believe I have. May I?

24 THE COURT: Sure.
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Bender-direct

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2 MR. WOHL: Excuse me, your Honor, while
3 Mr. Bender is looking at his file, I notice some people
4 sitting in the courtroom, including Mr. Mate and Judge
5 Baltimore, and I wonder if they are also going to be plain-
6 tiffs' witnesses, and if so, whether they should be
7 excluded from this testimony.

8 THE COURT: Are they?

9 MR. THAL: Mr. Baltimore will be, yes.
10 Mr. Mate, I don't think will be.

11 THE COURT: I am reluctant to say anything
12 to Judge Baltimore, but if the government wants you to stay
13 outside -- okay, thank you very much.

14 A Mr. Thal, I find nothing in my notes to
15 indicate that. It is possible that he may have mentioned it,
16 but I have nothing in my notes to reflect that.

17 THE COURT: And you don't recall it?

18 THE WITNESS: And I don't recall it.

19 Q Did Mr. Nathan ever tell you this? You want
20 it reread what I asked you earlier?

21 A You mean that Mr. Katz was at fault?

22 Q That Mr. Katz had admitted to Mr. Katzman his
23 errors in keeping the books, and the up-to-date, and
24 preparing the filing the proper tax --

25 A I don't recall. I just don't recall.

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Bender-direct

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Q Did Mr. Nathan tell you at any time prior

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to the trial that he had wanted to call the District

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Attorney about Sanford Katz, and that he was dissuaded from

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doing so by Mr. Katzman?

6

A I know he did tell me that he had wanted to

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do so, but whether he said he had been dissuaded by Mr.

8

Katzman, I have no recollection.

9

Q Did you ever discuss that subject with

10

Mr. Katzman during the conference?

11

MR. WOHL: Objection.

12

THE COURT: I will sustain the objection to

13

that.

14

Q At the time of the trial did you still feel

15

a duty of loyalty to Mr. Katzman as well as to Mr. Nathan?

16

A In connection with the Nathan trial?

17

Q As an attorney.

18

A I saw no connection.

19

THE COURT: He has answered the question.

20

MR. THAL: That is not the question.

21

THE COURT: It answers the question. If he

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saw no connection, he is saying it wasn't a question of

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loyalty as far as he was concerned. They were quite

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different. Please, he has answered the question.

25

Q Did you feel you needed Mr. Katzman's

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Bender-direct

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2 permission before you could proceed with the trial of Jack
3 Nathan?

4 A No.

5 Q But you asked for it, is that correct?

6 THE COURT: Asked for what?

7 MR. THAL: Permission from Mr. Katzman.

8 A No. I advised Mr. Katzman, and I asked him
9 if he had any -- if he could see any objections, and
10 he said no.

11 Q So in a sense you did ask for his permission
12 then?

13 THE COURT: Please don't keep -- the witness
14 answered the questions and it doesn't do any good for you
15 to try and say the question all over again.

16 MR. THAL: From the transcript, your Honor,
17 of the hearing before the Court regarding the conflict at the
18 trial, if I may quote from it, Mr. Bender states "I have
19 spoken to Mr. Katzman yesterday and told him I was dis-
20 closing the question, and I asked him if he has any ob-
21 jection to my still representing Mr. Nathan under these
22 circumstances, and he said absolutely none."

23 THE COURT: He just said that.

24 Q Mr. Bender, have you represented a number of
25 clients in matters involving the Internal Revenue Service?

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Bender-direct

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A I have.

Q Could you estimate how many for us?

A Since I have been in practice?

Q Yes. A round number will do.

A I am afraid really if I did, it would be
such a wild guess, it would hardly be accurate.

Q How many years have you been practicing?

Let me ask it that way --

A 42 years. 41 years.

Q No doubt that you have represented
a great many clients regarding Internal Revenue Service
matters?

A Nothing wrong with that characterization.

Q On occasion do you represent clients before
criminal charges have been brought against them as the re-
sult of the Internal Revenue Service investigation?

THE COURT: I don't understand that question.
How does he know he is representing them before a criminal
charge is brought against them?

MR. THAL: Prior to indictment.

THE COURT: No. I think the question he is
asking you is you had clients where you represented them
before the IRS and in subsequent legal proceedings that
you also represented them in.

1 THE WITNESS: Yes, I have, your Honor.

2 THE COURT: Okay.

3 Q Would you mind if we refer to this as indict-
4 ment, as the indictment avoidance stage of the case.

5 THE COURT: What?

6 MR. THAL: Indictment avoidance stage of the
7 case.

8 THE COURT: I don't understand that. I didn't
9 understand the purpose of going before the Internal Revenue
10 Service was to avoid --I thought the purpose was to explain
11 your position.

12 MR. THAL: Am instructed not to proceed with that
13 question?

14 THE COURT: I don't like that expression.

15 Q ARE there occasions when you represent a
16 client prior to an indictment, and the investigation terminates
17 without criminal charges being brought?

18 A Yes.

19 MR. WOHL: Objection.

20 THE COURT: He has answered it, but I will sus-
21 tain the objection. He has answered it.

22 MR. THAL: The basis for this objection is
23 what, relevance?

24 THE COURT: Please go on. You are wasting
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Bender-direct

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really a lot of time on these questions. He has
answered it. He says yes.

Q Does this happen frequently?

MR. WOHL: Objection.

THE COURT: I will sustain the objection.

MR. THAL: What is the basis?

THE COURT: It has nothing to do with the case.
Nothing whatsoever to do with the case.

MR. THAL: They do, your Honor, if I were
to have permission to ask these subject of connection.

THE COURT: No. There is not going to
be any subject of connection. You continue with the
questions as far as they relate to this 2255 proceeding.

MR. THAL: This is inherent in what
I am doing. I am trying to get at the factors that
involved -- that a lawyer is involved with when he has to
make certain decisions. I cannot ask Mr. Bender questions
about Mr. Katzman's case. That we have established so I am
asking some theoretical questions.

THE COURT: What in the world do you think this
question is going to produce at this hearing? Give me
an offer of proof. What is this going to prove?

MR. THAL: May I do it outside the --

THE COURT: No. Do it right now.

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Bender-direct

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2 MR. THAL: It seems to me it will bring out
3 in a hypothetical factor what factors go into the
4 decision of counsel of calling a witness or not calling
5 a witness and what the results are and can be, and I can't
6 ask about Mr. Katzman.

7 THE COURT: All I am interested in is this
8 case, and it is quite immaterial whether the lawyer in this
9 case represented a lot of people before the IRS or did not.
10 It is quite immaterial. The question posed here is whether
11 there was a conflict of interest and whether that conflict
12 of interest caused Mr. Bender to do certain things.
13 That's the only question, and we are not going to get
14 into all this stuff. I assure you.

15 Q Mr. Bender, were there any considerations in-
16 volving the case or the matter of Joseph Katzman which
17 entered into your mind when you advised Mr. Jack Nathan not
18 to take the witness stand in his own defense?

19 A None whatsoever.

20 Q You are absolutely certain of that?

21 A I am positive.

22 Q How can you be so positive, Mr. Bender?

23 THE COURT: Don't argue with the witness. He
24 says no.

25 MR. THAL: Your Honor, again my hands are tied

1
2 completely.

3 THE COURT: All right, he answered that question
4 no.

5 MR. THAL: I can't ask it in a hypothetical
6 fashion. I can't ask it directly because of the Katzman
7 attorney-client privilege. I can't ask it in another sense.

8 THE COURT: Go ahead with your questions, please.

9 MR. THAL: Which line should I now continue
10 on?

11 THE COURT: Ask your questions. If you got any
12 other questions. He has answered that one, and it
13 doesn't do any good to argue with him and say how can you
14 be so sure.

15 MR. THAL: I have no further questions of this
16 witness.

17 THE COURT: Any questions?

18 MR. WOHL: Yes, your Honor.

19 CROSS EXAMINATION

20 BY MR. WOHL:

21 Q Mr. Bender, when for the first time did you
22 discuss with Mr. Nathan the fact that you also represented
23 Mr. Katzman?

24 A I believe I indicated it was some time prior
25 to the trial of this action.

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Bender-cross

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Q And that was the meeting where you said you thought Mr. Frankel was present and you didn't know whether Mr. Baltimore was also present. Is that correct?

A That is correct.

Q That occurred in your office?

A That is correct.

Q Could you tell us the substance of what you said to Mr. Nathan, and what he said to you if anything on that subject?

A I told Mr. Nathan that I represented Mr. Katzman in a totally unrelated matter involving a client of Mr. Katzman's that I had not until this time put together the two people, that is to say that this was the same Katzman that I had been involved in representing Mr. Nathan during the Internal Revenue investigation, that I felt that because of that fact it might be difficult in the event Mr. Katzman is called as a witness, which I had understood Mr. Katzman was going to be for the government -- in view of that relationship and that he ought to consider other counsel in connection with that, and that I think in substance that was it.

2 Q Did Mr. Nathan say anything in response?

3 A I think Mr. Nathan wanted to know what the
4 matter was that Mr. Katzman was involved in. I told him
5 I could not tell him that, and Mr. Nathan and I discussed
6 who the other counsel could be, and we both discussed
7 the possibility of Judge Baltimore, and that in the
8 event that he felt that under these circumstances he
9 still wanted me to represent him, that this would neverthe-
10 less be a matter that I would call to the attention of
11 Mr. Frank Wohl, the Assistant U. S. Attorney, and the
12 court at the earliest possible moment.

13 Q Did Mr. Nathan say anything further in that
14 conversation on this subject, after you discussed the
15 idea of possibly Judge Baltimore taking over the case?

16 A Mr. Nathan seemed to indicate that he did
17 not want me out of the case. He thought that Judge
18 Baltimore could handle this if Judge Baltimore was
19 willing to, and he felt he would be, and that it was
20 perfectly all right to discuss this, which we did.

21 Q To discuss it with who?

22 A With the Court.

23 Q When you say you talked about having Judge
24 Baltimore handle the case, are you saying that you
25 discussed with Mr. Nathan the idea of Judge Baltimore

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Bender-cross

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2 together over the entire case or Judge Baltimore's cross
3 examining this witness?

4 A It was the latter. As far as Judge Baltimore
5 was concerned, it was the latter.

6 However, I gave Mr. Nathan the opportunity
7 in view of this disclosure for him to decide at that time
8 whether he felt that I could not represent him adequately,
9 and that would be a matter that would have to be taken up
10 with the Court, particularly since it was a week or so
11 before the trial.

12 Q Do you recall any specific event that
13 triggered in your mind the fact that--or the realization
14 that you represented two clients who were in one way or
15 another connected with the Jack Nathan case?

16 A Yes.

17 Q What was that?

18 A I think it was a telephone call that I had
19 made to Joseph Katzman. At that time the Joseph Katzman
20 who was involved with Mr. Nathan had learned that it was
21 the same Joseph Katzman who I represented in the other
22 matter.

23 By that I mean that in the conversation with
24 him I asked him, Mr. Katzman, if he was the Katzman in
25 the Nathan matter. He said he was, and that led to my--
for the first time my realization.

Q Did you have any conversation with Judge Baltimore about whether he would be willing to undertake the cross examination of Mr. Katzman if Mr. Katzman should be called as a witness?

A I am not sure that we did, but I think we did. I think I met with Mr. Nathan and Judge Baltimore in my office shortly after that, and I think we discussed it.

Q Can you recall the substance of that discussion, that is who said what on the subject of conflict of interest?

A Simply that because of this possible conflict, which incidentally, I indicated I wasn't sure was a conflict, but that in an abundance of caution for Mr. Nathan's protection and for his interest in the case, I felt that somebody other than myself should be in a position to vigorously, if necessary, cross examine Mr. Katzman if he appeared as a witness.

Q Did Mr. Nathan say anything at that time as to whether this was agreeable to him?

A Yes, he did.

Q What did he say?

A He said that would be all right.

Q Did Judge Baltimore say anything about that?

A Judge Baltimore said he would be delighted.

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2 Q When did you meet Judge Baltimore for the first
3 time in connection with this case?

4 A I think early in the representation of Mr.
5 Nathan in early spring, 1974.

6 Q And who introduced you to Judge Baltimore?

7 A I think it was Mr. Nathan.

8 Q And did Mr. Nathan or Judge Baltimore or anyone
9 else at that time say what Judge Baltimore's function was
10 going to be in this case?

11 A Well, Mr. Nathan wanted him to appear as co-
12 counsel.

13 Q Is that what Mr. Nathan said, or Judge Baltimore,
14 or can you remember?

15 A That is what Mr. Nathan wanted. I resisted this
16 at first because--well, I resisted it at first. Subsequently,
17 I had a conversation with Judge Baltimore about that.

18 Q And was that over the telephone or in person, if
19 you can recall?

20 A I am not sure whether it was in person or on
21 the telephone.

22 Q And approximately when did that conversation occur?

23 A I am not exactly sure, Mr. Wohl. I think it
24 was sometime thereafter in that year.

25 Q Prior to the trial during your representation of

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Bender-cross

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Mr. Nathan?

A Yes, prior to the trial.

Q Can you tell us the substance of what you said and what Judge Baltimore said in that conversation?

A Judge Baltimore indicated that as a judge in the criminal court in Westchester County, he did not feel it would be proper for him to appear as co-counsel in the criminal case in the Federal Court. And I told him that Mr. Nathan had told me that he wanted to be co-counsel. He said that wasn't so. So that all that he wanted to be was associated with me in whatever way I felt I could help him and in whatever way he felt he could help Mr. Nathan.

Q Did you have any further conversations with Judge Baltimore or Mr. Nathan after that on the subject of what Judge Baltimore's function was going to be in representing Mr. Nathan?

A I had many conversations, Mr. Wohl, with Judge Baltimore, which were instigated either as a result of a telephone conversation between Mr. Nathan and Judge Baltimore, or between--or which was instigated by Mr. Nathan to me to contact Judge Baltimore, and this went on all prior to the trial and during the trial.

Q Can you tell us in general what the subject matter was of your discussions with Judge Baltimore?

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2 THE COURT: I don't want to get in general.
3 Judge Baltimore was with you during the trial. Is that
4 right?

5 THE WITNESS: You mean before and after, and
6 during?

7 THE COURT: Yes.

8 THE WITNESS: Yes.

9 THE COURT: I recall seeing him at the trial.

10 THE WITNESS: Of course.

11 THE COURT: I don't want to get into all the
12 discussions you might have had with Judge Baltimore, only
13 discussions relating, I guess, to Mr. Katzman. Is that what
14 your question is? What is your question?

15 MR. WOHL: My question was if Mr. Nathan--
16 excuse me. Mr. Bender could give us briefly what the
17 subject matter of the discussions was that he had with
18 Judge Baltimore, the nature of the conversations.

19 THE COURT: With respect to what?

20 MR. WOHL: With respect to the Nathan case.

21 MR. THAL: Objection.

22 THE COURT: I think I will sustain. I don't think
23 I want to open the conversations they may have had. I
24 think if you had any further discussions with Judge Baltimore
25 relating to the possibility of Mr. Katzman being called for

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Bender-cross

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trial, called at the trial and what would happen, I will let you give those. Do you recall any such discussions?

THE WITNESS: We did have, your Honor, some discussions together, and at times with Mr. Nathan on trial strategy and strategy of witnesses. We did.

Q Did you ever discuss with either Mr. Nathan or Judge Baltimore the question of whether or not Mr. Nathan should testify in his own defense?

A Yes.

Q On how many occasions did you discuss that with Mr. Nathan?

A I would say that the subject came up several times before the trial. As far as a discussion on it, it became a discussion as I recall it more closely during the trial and before it became necessary to make that decision on Mr. Nathan's part.

Q Can you tell us the substance of what you said and what Mr. Nathan said on the subject of whether or not Mr. Nathan should testify in his own defense?

A I think the direct issue did not arise that way. I think we talked generally about what Mr. Nathan knew about the case. I had the benefit of prior statements that he had made to the Internal Revenue Service which I had evaluated, and I believe Mr. Nathan had indicated that

1 he expected to be a witness.

2
3 There was great feeling on Judge Baltimore's
4 part that Mr. Nathan should not testify as a witness.

5 Q This is what Judge Baltimore said?

6 A At times, yes. We had discussed the fact that
7 Mr. Nathan was a bull in a china shop, and that his complete
8 absorption with the persecution that he felt was being
9 conducted against him by Special Agent Schneider outweighed
10 all possible good, or outweighed the relevant issues in the
11 case. Mr. Nathan is a volatile individual. He does not
12 answer questions well. These are things that we discussed
13 as to whether or not it would be to Mr. Nathan's advantage
14 before a jury to testify in his own behalf, and these are
15 the things that I discussed with Judge Baltimore.

16 There were conferences where we had with Ted
17 Mate, Sandy Frankel, myself, Mr. Nathan, on any number of
18 occasions, culminating in a decision that we all came to
19 after the government had completed its case, I believe that
20 a recommendation should be made to Mr. Nathan that he not
21 testify.

22 Q In all of these discussions were there any other
23 considerations that you discussed leading to the conclusion
24 that Mr. Nathan should not testify, other than Mr. Nathan's
25 demeanor or expected poor demeanor as a witness?

2 A Yes.

3 Q What were those?

4 A In connection with the 1120S: change over to
5 the 1120, which discussed this with Mr. Nathan, Mr. Nathan
6 produced at my request the corporate minutes of his
7 corporation plus a check book. Mr. Nathan told me that Mr.
8 Katzman advised him in order to get a tax advantage
9 in filing the amended returns and the delinquent returns
10 from an 1120S to 1120, something to the effect that the 1120
11 would tax the outstanding checks by some maximum 48 and a
12 half percent, whereas the subchapter S might be slightly
13 higher.

14 He said that Mr. Nathan, that in order to do
15 that, there would have to be a change of ownership on the
16 1120S, which would prevent Mr. Nathan from filing an 1120S,
17 that Mr. Nathan then at Mr. Katzman's suggestion went to
18 his corporate books, had his lawyer, who was then deceased,
19 draft corporate minutes reflecting the issuance of stock
20 to his wife, and backdating the minutes, issuing a stock
21 certificate for the amount of stock to his wife, and back-
22 dating that, and that that eliminated the chance of the
23 eligibility for an 1120S and filing an 1120.

24 When Mr. Nathan admitted that to me I
25 asked him under those circumstances does he feel that he can

2 take the stand in this case if asked about the reasons
3 why the 1120S were not used but the 1120 and answer truth-
4 fully, and if he did, what this would do to his case
5 which involved an issue totally unrelated to the 1120S and
6 1120, and that to me was what was most important in my
7 mind that might come out on cross examination of Mr. Nathan
8 had he taken the stand.

9 Q Do you recall any other of these collateral
10 matters unfavorable to Mr. Nathan that you thought might
11 come out on cross examination?

12 A Yes.

13 Q Could you tell us what those are?

14 A Mr. Nathan has a bookkeeper.

15 MR. THAL: I object to that.

16 Your Honor, I think I am aware of what Mr.
17 Bender is going to say, and I object on the grounds of
18 relevance to this inquiry at all. It has nothing to do
19 with the 2255. It is what I was afraid of when I originally
20 said I wanted to limit the waiver of the privilege to some-
21 thing that it is somewhat relevant--

22 THE COURT: Is one of the issues in the 2255
23 the issue of whether Mr. Nathan was properly represented
24 at the trial because he offered no witnesses?

25 MR. WOHL: That is right.

1 THE COURT: On the part of the defense.

2 MR. WOHL: That is the gravaman of the claim.

3 MR. THAL: The individual Mr. Bender is now
4 going to mention has nothing to do with the 2255, nor in my
5 view the issues which we have raised.
6

7 THE COURT: I think I see your point on that,
8 and I don't think we need to go into the reasons why Mr.
9 Bender may or may not have called a particular witness.
10 He has answered that he discussed the matter and did not
11 call him.

12 MR. WOHL: I think the point is slightly dif-
13 ferent, if I may, your Honor. The question is whether--
14 the question most seriously raised by this 2255 is the
15 decision of the defense not to have the defendant testify
16 in his own behalf at the trial, not some other witnesses,
17 and the government's view is that defense counsel's con-
18 cern of unfavorable matters that would have come to the
19 defendant's door on cross examination is of critical
20 significance to the defense's strategic decision at the
21 trial.

22 THE COURT: I think I understand that, but I
23 think that I agree that we don't have to get into the de-
24 tails. I think it is sufficient if Mr. Bender, as I think
25 he already has stated, that with respect to this particular

2 person he advised against calling them as a witness because
3 he thought it would have an adverse effect. Is that correct?

4 THE WITNESS: You mean this bookkeeper?

5 THE COURT: Yes.

6 THE WITNESS: Without a doubt, your Honor.

7 THE COURT: I think that covers the point without
8 getting into all these details, which I don't think you
9 should go any further than that. Why don't we take a five
10 minute recess.

11 (Recess taken.

12 THE WITNESS: Your Honor, if I may be permitted,
13 there was one other reason that I would like to mention as
14 another reason why we or I did not recommend it against Mr.
15 Nathan not taking the stand, and that was that there was a
16 danger that if he testified there was an individual who
17 worked in his concern, a Beatrice Carrasquillo, who was
18 under subpoena by the United States Attorney as a government
19 witness, but who had not called her, might be called in
20 rebutal to Mr. Nathan's testimony.

21 THE COURT: All right.

22 Q And what danger did you see as that presenting
23 to Mr. Nathan's case?

24 MR. THAL: Objection.

25 THE COURT: I think I am going to sustain that

objection. You felt that on the basis of what you knew at that time, that that would be a possibility if he took the stand, that is the reason why you advised against it?

THE WITNESS: That is correct.

THE COURT: I will leave it at that.

Q Did you see any other collateral unfavorable matters that might come out on Mr. Nathan's cross examination, if he took the stand?

A I can't think of any at the moment.

Q At the time of the trial--withdraw that.

At the time the tax returns in question were filed, did Mr. Nathan have other companies besides Nathan, Nathan and Nathan, which was the company relating to the tax returns at the trial?

A Yes, he did.

Q Did you think that it would--

THE COURT: He said he did have some other companies. Does that have any effect on it?

THE WITNESS: On which?

THE COURT: On the decision that Mr. Nathan not testify.

THE WITNESS: Oh, no, your Honor.

THE COURT: Okay.

Q Who made the decision that Mr. Nathan should not

testify or would not testify, excuse me?

A The only one that could, Mr. Nathan.

Q Did you have any discussions with Mr. Nathan on the question of who was going to make that decision?

A Yes.

Q What did you say, and what did Mr. Nathan say on that subject?

A Mr. Nathan--sorry.

MR. THAL: Objection. I think it is asked and answered.

THE COURT: I think it has been. I take it I do recall that at that time, at the time of the trial anyway, I think Mr. Nathan told me that he was relying on his lawyer, so you talked to Mr. Nathan, and as a result of your advice, Mr. Nathan concluded he would not take the stand. Is that correct?

THE WITNESS: Basically, your Honor, but if you will remember the transcript, I wanted or insisted that you get a direct answer from Mr. Nathan himself.

THE COURT: I remember that.

THE WITNESS: Not that he was just relying upon my recommendation.

Q Are you now referring to the question of whether Mr. Nathan would testify, or this conflict question?

2 THE COURT: I think on whether he would
3 testify.

4 A On whether he would testify. I am trying to
5 tell you that while I recommended that he do not take the
6 stand, and so did the others who were in counsel at the
7 conference, that I insisted that that be a decision that
8 ultimately be made by Mr. Nathan himself, and I did not
9 want Mr. Nathan to simply say, "Well, I will just do whatever
0 you tell me to do." I wanted him to make certain that he
1 was aware of the reasons why this advice was given, and
2 that ultimately he had to make the final decision which he
3 did, but I can't deny the fact that he relied a great deal
4 upon the judgment of myself and others in making the
5 recommendation to him.

6 Q Who were the others who recommended that he not
7 testify?

8 A Judge Baltimore, Ted Mate, Sandy Frankel.

9 Q No, did you have any discussion with Mr. Nathan
10 on the question of whether or not witnesses other than
11 himself should be called to testify for the defense?

12 A Would you repeat that question, please?

13 (Record read.)

14 A Yes.

15 Q And who was present at those discussions?

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Bender-cross

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A I believe Mr. Frankel of my office. I believe Judge Baltimore may have been there, and Mr. Mate may have been there. I am not positive, and, of course, Mr. Nathan.

Q Can you tell us the substance of the conversations with Mr. Nathan and others when Mr. Nathan was present on this subject of whether or not other witnesses should be called for the defense?

A Yes. Do you want to know when it was or what took place?

THE COURT: I guess he wants to know both.

Q if you can recall.

THE COURT: I think he wants to know both.

A Well, during the course of the trial, I even think prior to the trial, Mr. Nathan mentioned to me on any number of occasions the what he called the improper and bull-like tactics of Special Agent Schneider in invading his office and causing a commotion there, and that there were two witnesses, one a young lady who worked in his place, and a young man who worked in his place, who were abused by the special agent, and I told him that it sounds good. We might be able to use them, provided their testimony would be in some way material to the issues in the case, and sometime prior to the time that the government rested, Mr. Nathan brought those two people to my office. I

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Bender-cross

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2 interviewed them, and based upon what they told me, I
3 advised Mr. Nathan that I was of the belief that their
4 testimony would be objectionable, that it was extraneous, that
5 it related to the activities of Special Agent Schneider,
6 but it did not relate to anything which would go to the
7 innocence or defense or guilt of the defendant, certainly
8 not the innocence, and that I felt that there were dis-
9 advantages to it, such as, for example, it would have to
10 be revealed that Mr. Nathan had locked his door and--

11 MR. THAL: Objection. This is again--I think--

12 THE COURT: I will sustain the objection on that.
13 We need not go into the details on it, but you felt that
14 you had good reason to recommend that these people not be
15 called?

16 THE WITNESS: Yes.

17 A And there was also the other witness, Beatrice
18 Carrasquillo.

19 MR. THAL: Objection. This has been discussed
20 before. I think your Honor already ruled that the decision
21 was made, and we don't have to go into the details.

22 THE COURT: Let the record show, and I guess
23 we did review this order and you advised against calling
24 Beatrice Carrasquillo.

25 THE WITNESS: That is correct. The only other

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Bender-cross

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witness was Teddy Mate that I referred to already.

Q And there was no discussion concerning Mr. Katzman being called?

A No, none whatsoever.

No more anymore after we had discussed the other question which resulted in the conference before Judge Bonsal.

Q As you--

A May I amend that. I think that there may have been other witnesses that Mr. Nathan mentioned. I think some of the hotel people with whom his firm was doing--was on retainer for collections, and they were discussed between Mr. Nathan and myself, and there was no question that we would call them, but the government called them, and we just cross examined them.

Q Given the posture of the government's case at the time the government rested, did you know of any witness who you thought could be called as a defense witness: who would advance Mr. Nathan's case?

A The only one, possibly Sandy Katz, to call him back.

Q But he had been called as a government witness.

A And he had been examined and cross examined extensively, and I made up my mind that there was no point in

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Bender-cross

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bring him back to give the government another chance or another crack at him, so the answer is I can't think of anybody else. We had discussed character witnesses, but Mr. Nathan chose not to produce or have any people come in. He was kind of concerned about the case being known in the industry in which he worked.

Q During the trial, did you in any way consider the question of whether or not Mr. Katzman should be called as a defense witness?

A Considered it, you mean during the trial?

Q Yes.

A No.

Q Did you in any way during the trial consider whether or not it would be to Mr. Katzman's advantage to be called as a government rebuttal witness in the event Mr. Nathan testified?

A I did not consider it. Only from the point of view that if Mr. Katzman was called as a government witness in rebuttal, that damaging testimony to which I have previously referred would have come out.

Q That was the evaluation of the matter in light of Mr. Nathan's case rather than from Mr. Katzman's point of view. Is that correct?

A That is correct.

Q Looking at it now, do you see any way that it would have damaged Mr. Katzman's position to testify as a government rebuttal witness in the Nathan case?

A I don't think I can answer that question.

THE COURT: You don't?

THE WITNESS: I don't really know, your Honor.

THE COURT: You don't?

THE WITNESS: I really cannot answer that question.

Q Did you ever form an opinion that it would be adverse to Mr. Katzman's interests to be called as a rebuttal witness in the Nathan case?

A No.

Q After the trial, Mr. Nathan retained other counsel. Is that right?

A That is correct.

Q When was the first time you received any inquiry from the successor counsel for Mr. Nathan on the question of a possible conflict of interest at the Nathan trial?

MR. THAL: Objection, your Honor. Relevance.

THE COURT: I think I will let him answer this time. You can answer when that was first inquired into.

MR. THAL: Could I have the question reread before he answers it?

(Record read.)

A Could I just refresh my recollection from something a moment?

THE COURT: Sure.

A I don't think I can specifically answer that question, other than to say it was sometime in 1976.

Q Did you ever go as far as working out a proposed direct examination of Mr. Nathan in the event that he testify as a witness in his own defense?

A I don't think so.

Q Did you go so far as discussing with Mr. Nathan the subject matter of--

THE COURT: Did you discuss?

Q Did you discuss with Mr. Nathan what his testimony would be in his own defense if he testified?

MR. THAL: I think that has been asked and answered.

THE COURT: I will let him answer. I think it has, too.

A Mr. Nathan and I discussed every bit of testimony taht was brought out in the case.

THE COURT: I think the question is whether you discussed with Mr. Nathan the nature of his testimony, if he did testify.

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Bender-cross

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THE WITNESS: Not specifically, not specifically.

MR. WOHL: No further questions.

MR. THAL: One question, your Honor, possibly
two.

REDIRECT EXAMINATION BY MR. THAL:

Q Mr. Bender, do you have an opinion as to whether
or not it would have hurt Mr. Katzman's IRS matter if it
turned out that Jack Nathan had testified at the Nathan
trial and had testified that Mr. Katzman had suggested the
back dating of the subchapter S corporate documents?

A Do I have an opinion?

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Bender-redirect

2 Q Yes.

3 A If it had come out?

4 Q Yes.

5 A It may have.

6 Q I am not sure that it is responsive. Are you
7 saying you have an opinion or you may have an opinion?

8 THE COURT: His opinion is that it might.

9 A It might. If it had come out and been dis-
10 closed, it might have.

11 Q Would you, as counsel for Mr. Katzman, have
12 preferred that it not come out?

13 A Are you asking me now or at the time?

14 Q I ask you now.

15 MR. WOHL: I will object, your Honor. I think
16 the only relevant question would be at the time of the
17 trial.

18 THE COURT: I rather think it would too.
19 I think at the time of Mr. Nathan's trial. We will put
20 it on that basis.

21 A No. Not at the time of the Nathan trial.

22 MR. THAL: I think, your Honor, if I may,
23 it would be appropriate to let him reflect on it in
24 terms of after the events.

25 THE COURT: No. He has answered the

Bender-redirect-recross

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1 question. I think it should be limited to the time
2 of trial.
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4 Q Do you recall, Mr. Bender, approximately how
5 many days of the trial or what percentage of the trial days
6 Mr. Baltimore was with you at counsel table?

7 A Honestly, I don't recall. I have a recol-
8 lection that he was there a certain number of times, but wheth-
9 he was there half of the time or three-quarters of the time,
10 I don't recall. I think the transcript would indicate it.
11 I think.

12 Q I think you indicated on cross examination
13 that there was no discussion about Mr. Katzman's being
14 called as a defense witness during the trial.

15 A That is correct.

16 Q There was such discussion prior to the trial?

17 A Oh, yes.

18 MR. THAL Thank you.

19 THE COURT: No more questions?

20 MR. WOHL: Just one question, your Honor.

CROSS EXAMINATION

21 BY MR. WOHL:

22 Q It is responsive to that.

23 If you had called Mr. Nathan to testify in his
24 own defense, would you have asked him about this Katzman
25

bbbr 3 Bender-cross

matter on his direct testimony?

A No.

THE COURT: Wait. I think I am going to sustain the objection if there is one made. He didn't call it. Do you object?

MR. THAL: I do.

THE COURT: I sustain the objection.

MR. WOHL: No further questions.

(Witness excused.)

MR. THAL: May I proceed, your Honor?

THE COURT: Please do.

MR. THAL: Mr. Nathan. I call Jack Nathan to the stand.

J A C N A T H A N, the plaintiff-petitioner, called as a witness in his own behalf, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. THAL:

Q Mr. Nathan, if you can't hear me at any time, just say so, and I will try to speak up.

When and under what circumstances did you first meet with Mr. Louis Bender?

A Some time in 1973. I needed counsel to arraign me in the courts. I went to Mr. Bender's office with my

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Nathan-direct

wife and retained Louis Bender and his associate, Sanford Frankel at his office at 225 Broadway, New York.

Q At the time you first went to Mr. Bender, was the name Joseph Katzman discussed between you and Mr. Bender?

A Very much so. I told him it was my main witness. He asked me his name. I told him it was Joseph Katzman, a certified public accountant. He asked me his address. I told him it was 79 Madison Avenue, New York.

He asked me if he was connected with any firm, and I told him it was with Popper, Katzman. I didn't recall the third name. There were three names connected with the corporation.

Q Popper, P-o-p-p-e-r, Katzman?

A Yes. Yes, and there was another name. I told him that Mr. Katzman was about 70 years old. He was very interested in knowing the name and address of the certified public accountant, and I was very interested in him because he was my main witness.

Q And you had a number of discussions.

Did you have more than one discussion with Mr. Bender regarding Mr. Katzman as a witness?

A I did.

1 bbbr 5 Nathan-direct

2 Q Can you estimate approximately how many
3 discussions there might have been?

4 A Yes. At different times I had spoken to
5 Mr. Bender whether he had interviewed Joseph Katzman,
6 and he told me he did, and he would be a very good witness.

7 Q Did Mr. Bender ever advise you against calling
8 Mr. Katzman as a witness?

9 A No, sir.

10 Q Did you ever discuss with Mr. Bender the
11 question of whether you would take the witness stand
12 at your trial?

13 A I did. I told him that I even went to the
14 grand jury myself voluntarily, and that I had spoken to --
15 voluntarily to at least two, I think -- well, Henry Putzel
16 was one. There is another one I spoke to. There was
17 another prosecutor I spoke to. I don't recall his name.
18 Voluntarily.

19 Q Am I to understand that you wanted to take
20 the witness stand?

21 A I sure did. I am glad to be here, sir. This
22 is my first opportunity after seven years.

23 Q What did Mr. Bender tell you with regard to
24 taking the witness stand?

25 A I understand that Mr. Bender said I was very

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Nathan-direct

2 volatile. I sure was. Every day I fought him. I wanted
3 to put witnesses on the stand, and he objected, and many times
4 he said, "Listen, I am your counsel, and you have got
5 to listen to me."

6 At one time I said to him -- excuse me, sir,
7 at one time I said to him, "I am going to speak to Judge
8 Bonsal," and he said, "If you raise a rumpus in the court,
9 that Judge Bonsal will call a marshal and lock you up."

10 He kept threatening me that.

11 THE COURT: One thing, Mr. Nathan, on that.
12 When did you first talk to Mr. Bender, if you recall, on this
13 question of whether you would testify? How long before
14 the trial? Do you remember that?

15 THE WITNESS: I was always telling him that.

16 THE COURT: How far back from the time you were
17 arraigned?

18 THE WITNESS: Yes, sir.

19 THE COURT: In other words, that was quite
20 a while. Did you say you were arraigned in 1973?

21 THE WITNESS: Whenever the time. I believe
22 it was about then. The time of my arraignment I needed an
23 attorney for arraignment, and that's why I went.

24 THE COURT: From that time on you had indicated,
25 as I understand, to Mr. Bender throughout all this

1 bbbr 7 Nathan-direct

2 period --

3 THE WITNESS: I was looking for it. This
4 'is the first opportunity I have in seven years to tell my
5 story.

6 THE COURT: I know that, but the point is you
7 were saying to Mr. Bender, as I understand your testimony,
8 continually "I want to testify"?

9 THE WITNESS: Yes, sir.

10 Q Did Mr. Bender advise you of your legal right
11 to take the witness stand in your own behalf?

12 A No, sir.

13 Q As I understand it, you certainly did not take
14 the stand. Did you rely on Mr. Bender's advice in
15 ultimately not taking the witness stand?

16 A At one time I was going to go to Judge Bonsal
17 myself, and I was going to open it up in court, but Mr.
18 Bender --

19 Q I think you discussed that before.
20 Just try to answer the question.

21 A Mr. Bender kept telling me not to be my own at-
22 torney. The Judge would object.

23 Q Did you rely on Mr. Bender's advice?

24 MR. WOHL: Objection.

25 A Yes, sir.

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Nathan-direct

MR. WOHL: As leading.

THE COURT: The witness answered that he did.

THE WITNESS: Yes, sir. I had no alternative.

Q Please don't volunteer anything.

A I am sorry.

Q When did you first learn that there was a conflict or might be a conflict of interest involving Mr. Bender's representation of you and Mr. Katzman?

A When we were in court, we were ready in court, and I believe the jury was already picked. I am not certain whether the jury was picked, your Honor.

Q Where did this first conversation take place?

A In Lou Bender's office.

Q Are you then saying in or about the first day of the trial?

A We were in court, yes, sir. It must have been the first day of the trial.

Q How did you learn of this problem?

A Judge Baltimore was with me. I do not believe Sandy Frankel was there at all. Not to my recollection. Lou Bender said to me, "I have something that I think you should know. I represent -- I know Joseph Katzman, and there is some relationship," and I said, "What is the

1 bbbr 9 Nathan-direct
2 relationship?", and he said "I can't tell you. It is
3 an attorney relationship," and Judge Baltimore then said
4 to Lou Bender, "You will have to give Jack his money
5 back."

6 I had a \$25,000 deposit with Lou Bender, a
7 credit balance.

8 Q Mr. Nathan, wait a minute.

9 MR. WOHL: I will object to counsel cutting
10 the witness off.

11 THE COURT: He has answered that.

12 MR. THAL: I am trying to stay with the
13 relevant answers, your Honor.

14 A I had a \$25,000 deposit.

15 MR. WOHL: I object to this, your Honor.
16 I think the witness' demeanor is very important here.

17 THE COURT: Okay.

18 MR. THAL: If your Honor wants him to go on --

19 THE COURT: I think what he is saying to you,
20 Mr. Nathan, is just answer the question when it is asked
21 of you, if you would. It would help.

22 THE WITNESS: I am sorry.

23 Q Can you tell me what did Mr. Bender tell you
24 about the conflict, just Mr. Bender's words to the best
25 of your recollection?

1 bbbbr 10

Nathan-direct

2 A He said he couldn't tell me too much because
3 of an attorney relationship, and he led me to believe that
4 Joseph Katzman was just a certified public accountant that
5 brought a client to him.

6 MR. WOHL: I object to the comment he led him
7 to believe.

8 THE COURT: All right.

9 A I believed. I absolutely believed, and Judge
10 Baltimore believed it.

11 THE COURT: Never mind about Judge Baltimore.
12 That was your impression.

13 THE WITNESS: Yes, sir.

14 Q Did you discuss at that meeting with Mr. Bender
15 and with Mr. Baltimore whether you should get new or
16 different counsel?

17 A I did, sir.

18 Q Could you tell us now what the substance of that
19 conversation was?

20 A I sure will. I said, "Well, Mr. Bender,
21 what should I do now? What do you suggest?
22 Do you know of anybody, another attorney that you could
23 recommend?", and he said "No," and he said, "Besides that,"
24 he said -- I said, "How will that affect Judge Bonsal?",
25 and he said, "He won't like it. He will look very unkind

1 bbbr 11

 Nathan-direct

2 against something like this if this is brought up," and he
3 said, "He won't be very favorable," and then, of course, he
4 was asked to give me a refund, and then Mr. Bender hemmed
5 and hawed and said it really had nothing to do with it.
6 He said this will be all right, and at that time, as you know,
7 I had an eye operation, and I didn't feel good, and I went
8 along with it to get it over with.

9 Q Let me interrupt.

10 MR. WOHL: I object to counsel interrupting
11 his own witness.

12 THE COURT: That is all right. Just try to
13 answer the question again, Mr. Nathan, as far as you can.
14 All right, go ahead.

15 MR. THAL: I will accept an instruction,
16 but I don't know which way you would like -- I am
17 attempting to keep the answer.

18 THE COURT: Answer the question, please.

19 Q Were you ever advised by Mr. Bender that your
20 testimony might contradict or conflict with any testimony
21 that might have been given by Mr. Joseph Katzman?

22 A No, sir.

23 Q Thank you.

24 Were there any discussions between you and
25 Mr. Bender before the trial regarding the Subchapter S status

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Nathan-direct

1 of Nathan, Nathan & Nathan Limited?

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3 A At some time I received a call from Mr. Bender
4 asking me for the stock book. He asked me whether I had it,
5 and I said I believe I did, and I had it delivered to his
6 office. Some time after that he showed me the book.
7 I don't recall just when, and I told him to take it up with --
8 if he wanted to know something about the stock records, he
9 should take it up with Joseph Katzman because he is the
10 one that arranged everything.

11 Q You told Mr. Bender that Joseph Katzman arranged
12 everything?

13 A That is correct, and I also told him that Joseph
14 Katzman's writing was on my stock certificates.

15 Q Did you and Mr. Bender discuss who initiated
16 the idea of changing the status of the company?

17 A Well, it was Joseph Katzman. I believe we did.

18 Q Was there a discussion between you and Mr.
19 Bender is my question.

20 A Yes, there was.

21 Q Could you tell us the substance of that
22 discussion?

23 A Yes. I told him that Joseph Katzman told me
24 that this should have been done a long time ago because
25 there were -- Joseph Katzman had asked me whether there

1 bbbr 13 Nathan-direct

2 was any stockholders in my corporation, and I said, "Well,
3 I don't know."

4 He said "Or owners," and I said, "Well, my
5 wife has an interest in it," and then he wanted to see
6 the stock record, and we arranged to bring it to Joseph
7 Katzman's office.

8 Q Are you telling us now about a conversation
9 between yourself and Mr. Bender?

10 A Yes. I told him that. That is right.

11 Q So you are continuing the conversation?

12 A Yes.

13 Q Are you finished?

14 A Yes.

15 Q Did you keep a daily trial notebook during the
16 course of your trial?

17 A Yes, and I finished it in the evening and referred
18 to it each time in the evening and in the morning before we
19 went to court with Mr. Bender.

20 Q Did you show this notebook to Mr. Bender
21 during the course of the trial?

22 A I did.

23 Q Did you discuss its contents with Mr. Bender?

24 A I did.

25 Q Was this regular?

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Nathan-direct

2 A Every day. I fought with him on this.
3 That is why he said I was very volatile.

4 Q I think you have answered it.

5 You signed an affidavit in connection with this
6 2255 petition, this habeas Corpus petition that we are
7 here on today. Do you recall that?

8 A Yes, sir.

9 Q Do you recall annexing certain two pages
10 to that affidavit?

11 A May I see them, your Honor?

12 THE COURT: I think he has reference -- you
13 have reference to this?

14 MR. THAL: Yes, your Honor. I really want
15 him to identify it.

16 A Yes.

17 Q Can you identify your handwriting?

18 A Yes. That is in my handwriting.

19 Q Those are pages from the trial notebook that
20 you referred to before?

21 A Yes.

22 Q Thank you.

23 Did you speak to Mr. Katzman since your
24 trial?

25 A I did.

1 bbbbr 15

Nathan-direct

2 Q Can you remember about when that was?

3 A Yes. I would say it was in April or May
4 of this year. I called --

5 Q What were the circumstances?

6 A I called Joseph Katzman at his office, and
7 I told him what had happened to me.

8 Q Did you learn from him during the course of
9 this conversation what the subject of his representation
10 by Mr. Bender was?

11 A I did.

12 Q Could you tell us?

13 A He told me that the government was after him
14 on a collusive -- alleged collusive deal with another of his
15 clients and was involving him on some tax fraud with another
16 client and that Mr. Bender was his attorney.

17 Q Did Mr. Katzman tell you at any time or during
18 this conversation or at any time thereafter what the outcome
19 of this problem with the Internal Revenue Service was?

20 A Yes, and that the IRS or the government had
21 closed their files on him.

22 Q Was he satisfied with the outcome?

23 A He was very satisfied with the way Mr. Bender
24 handled it.

25 Q Would you tell us what was your physical con-

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Nathan-direct

2 dition at the trial, Mr. Nathan?

3 A About a few days before I was due in your court,
4 your Honor, I had an operation for a bleeding retina,
5 an emergency operation at the Eye and Ear Hospital at
6 14th Street, and I had just come out of the hospital. I had
7 a note from my doctor that I was not allowed to read, and
8 Mr. Bender was up at my office. I asked Mr. Bender to come
9 to my office, and he did for two purposes.

10 No. 1, I wanted --

11 Q I am not sure that is responsive. I asked
12 you what your condition was.

13 A I showed him the note.

14 THE COURT: I think the question is purely
15 what your condition was.

16 A I showed him the note, and I asked him to
17 get me an adjournment.

18 Q Thank you. You were suffering from an eye
19 condition?

20 A From an eye condition, and then I had an
21 accident around my shoulder which -- injury, which com-
22 pounded something that I had in the Army. I hurt my
23 shoulder in the Army, and I fell on it again a few months
24 before, and I was in therapy on my shoulder.

25 Q Thank you.

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Nathan-cross

2 THE COURT: Do you have any questions,
3 Mr. Wohl?

4 CROSS EXAMINATION

5 BY MR. WOHL:

6 Q Mr. Bender was not your first attorney in
7 connection with your problem with Internal Revenue Service,
8 was he, Mr. Nathan?

9 A That is correct.

10 Q How many attorneys had you discussed your Internal
11 Revenue Service difficulties with prior to Mr. Bender?

12 MR. THAL: Objection, your Honor. The number
13 of attorneys --

14 THE COURT: I think it is all right for you to
15 answer if you will, Mr. Nathan. You discussed your
16 problem with other lawyers?

17 THE WITNESS: Yes.

18 THE COURT: Do you remember how many?

19 THE WITNESS: May I qualify that, sir?

20 THE COURT: Sure.

21 THE WITNESS: Let me tell you this: My sister
22 was being harassed. She is a diabetic, has poor circula-
23 tion. This is relevant, sir. It will lead to it.

24 She is a diabetic, and her circulation was poor,
25 and there was threats of amputation on her leg at that

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Nathan-cross

time, and she was in the hospital, and at that time I was very involved with her, and I did have as an attorney a very fine attorney and a gentleman, Jules Ritholz, fine gentleman, Ritholz, and very fine representation, and I was due at the time to go to Washington with him, voluntarily, to discuss this with some prosecutor, and through the harassment, my sister's pressure went up, and her diabetes, , her sugar went well over 2 or 300. She was in bad condition, and I looked around for a doctor, and I discovered a doctor in Atlanta, I think it was the St. Josephs Hospital in Atlanta, which required me to bring her down. Her life was at stake, and I asked Jules Ritholz to possibly get me a postponement on this.

He wanted me to go, and I said, "I have to -- my sister's life is at stake. I have to go."

I said, "I am going," and he said "Well" -- and then I had no alternative.

I went, but before I went, I didn't want to be in any kind of default so I had a personal friend of mine who I have known through my connections in the credit business. He was a former Assistant D.A., and I knew that he had been in Washington, so I called him up, and his name was Jay Goldberg, and I said, "Jay, I got this problem."

So he said, "Well, if you have a change of

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Nathan-cross

2 attorney," he said, "go down there, Jack," he said, "and
3 tell me where you will be and call me from the Downtown Hotel
4 in Atlanta."

5 So I called him from the Downtown Hotel in
6 Atlanta, and he dictated a letter to me to send to somebody
7 in Washington that I was getting a new attorney, and so
8 I had to spend a month there, and I had to be with my sistr.
9 Her life was at stake. I had no alternative, your Honor,
10 so I had to do it. I would have done it regardless.

11 THE COURT: In other words, at that point
12 you got Jay Goldberg?

13 THE WITNESS: That's right.

14 Q After you discharged Jules Ritholz and then
15 got Jay Goldberg?

16 A That's right.

17 Q How long did Jay Goldberg represent you?

18 A A very short period after that, and then
19 I had Lou Bender. On the recommendation -- I had called back
20 Jules Ritholz, and I said -- we had a very fine relationship,
21 and I said -- in fact we were on a first name basis, and
22 I said, "Jules, will you please take me back."
23 I said, "I know there were certain circumstances, and I didn't
24 want to do it," and I explained it to him, and he said he
25 was involved at that time with the Nixon doctor case, and

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Nathan-cross

1 he was very much involved, and he said he would love to have
2 taken me as a client, but he said no.

3 I said, "Who would you recommend?," and he said,
4 "Well, I know Mr. Bender," and I said, "I will tell you what
5 I will do. I will take Lou Bender if you will brief him
6 on it."

7 I said, "You are familiar with the case," and
8 he said he would be glad to brief Mr. Bender and to tell
9 Mr. Bender if he had any problem, to take it up with him.

10 Q Mr. Nathan, tell us what it was you thought
11 Mr. Katzman would testify to that would have helped
12 your case?

13 A I can't see how he could have harmed me if he
14 told the truth.

15 Q What was it that he would have testified to if
16 anything that you thought would help your case?

17 A He would have confirmed. I needed -- you
18 see, during the trial I kept really -- I was very volatile.
19 Lou Bender was absolutely right. I fought with him tooth
20 and nail.

21 I said, "You have to have confirming witnesses.
22 You hve got to bring somebody in to confirm it."

23 I had never been in a criminal court, and I am
24 65 years old, in my entire life, and I have never served
25

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Nathan-cross

2 on a jury, and I said to him -- I said, "We are going to
3 lose this case." I said, "If I was on the jury, I would con-
4 vict. You have got to have some witnesses."

5 He said, "Don't be your own attorney. If you
6 are going to carry on, they will call the marshal. They
7 will lock you up," and that's all he kept threatening me.

8 THE COURT: think the question is what way
9 do you think that Mr. Katzman would have helped you?
10 You did say he would have helped you.

11 A He definitely would have helped me. Sandy Katz
12 on the witness stand said Katzman was in charge and took care
13 of everything. So he would have confirmed it.

14 Q At the trial you were convicted of evading your
15 taxes for the years '67, '68, '69 and '70. Is that right?

16 A I believe so.

17 Q Now, did Mr. Katzman assist you in filing your
18 tax return for the year 1967?

19 A He was in charge. Let me say this. I don't
20 know the years. I know that when Joseph Katzman came into
21 the picture he was in complete charge, so I don't remember.

22 THE COURT: You don't quite remember?

23 THE WITNESS: I don't remember but he was in
24 complete charge.

25 Q Isn't it a fact that your return for the year

1967 was filed on or about April 15, 1968?

THE COURT: If you remember that. Do you remember?

A I don't recall. I don't recall the dates. That's seven, eight years ago.

Q When did you first retain Mr. Katzman to assist you?

A I had had IRS audits before.

THE COURT: No. If you recall, when did you first hire Mr. Katzman?

THE WITNESS: I was on audit with Agent Kerr, I believe.

THE COURT: Sorry.

THE WITNESS: I don't know the year. About a year after I was in audit.

MR. WOHL: May we have this marked as Government Exhibit 1 for identification, please.

(Government's Exhibit 1 was marked for identification.).

MR. THAL: May I just see it?

THE COURT: Yes.

MR. WOHL: It is the affidavit that the plaintiffs, or I suppose defendants we ought to call them, Mr. Nathan's counsel filed with their motion papers in the

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Nathan-cross

in the 2255 action, the affidavit of Mr. Katzman which is dated May 11, 1973, your Honor.

THE COURT: Okay.

Q I ask you to look at the fourth line of that handwritten affidavit which I believe you have seen before, Mr. Nathan, and I ask you if that refreshes your recollection as to about when you retained Mr. Katzman to represent you or to participate with you in this Internal Revenue matter.

A I don't recall the date.

THE COURT: Does that refresh your recollection?

THE WITNESS: I don't think it matters whether it was '70, '71. Whenever I -- about a year after we were were in audit I called him, and regardless of whatever date it was, it was a year after we were in audit. This can be confirmed by Agent Kerr.

Q This was the audit that led to your indictment. Is that right?

A That is right.

Q Did you know Mr. Katzman prior to this time that you hired him about a year after the audit started?

A I did not.

Q What was the --

I will withdraw that.

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Nathan-cross

Did Mr. Katzman in any way participate in your cashing checks up at these client hotels that we heard about at the trial, and then keeping the cash?

MR. THAL: Objection as to the form of the question.

THE COURT: I will sustain the objection to the form of that question, but I think the first part of it is all right.

A I don't even understand the question.

THE COURT: Try it again.

Q Did Mr. Katzman participate in any way in your practice of cashing checks at your client hotels?

A He might have participated in where those checks were deposited in the account.

THE COURT: I don't think that's what the question is. I think the question is whether he did any of the cashing of the checks.

A The back of the checks have a stamp on that I received cash. So I don't see how anybody else could have participated in the cashing of the checks. I cashed those. I cashed the checks.

Q You did that by yourself. Is that right?

THE COURT: He answered the question. He said that is right.

1 bbb 25

Nathan-cross

2 Q And you did that prior to the time you ever
3 met Mr. Katzman. Is that right?

4 A That is correct.

5 Q And you filed your 1967 and your 1968 tax
6 return prior to the time you ever met Mr. Katzman.
7 Isn't that right?

8 A I do not know whether they were filed.
9 Weren't they late in being filed?

10 Q I am asking you.

11 A I think they were late.

12 THE COURT: I think. Wait a minute. I think
13 Mr. Nathan said he didn't recall when. I think he testified
14 to that some time ago.

15 MR. WOHL: May we mark this as Government
16 Exhibit 2.

17 MR. THAL: That's a copy of the indictment in
18 the case.

19 (Government's Exhibit 2 was marked for
20 identification.)

21 MR. THAL: Mr. Wohl, may I just -- I was not
22 trial counsel and --

23 MR. WOHL: 10 count indictment. I believe
24 there was only one 10-count indictment file.

25 MR. THAL: Is that the one that's been

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Nathan-cross

reproduced in the appendix?

MR. WOHL: I don't know. 74 Cr. 477 is the number.

Q Now, Nathan, I am showing you this Government's Exhibit 2 for identification, and I direct your attention particularly to down where it says -- there is some columns, and it says "Count, date of filing," and there is some dates there, and I ask you whether or not that refreshes your recollection as to when you filed your '67 and '68 tax returns.

MR. THAL: Objection, your Honor.

THE COURT: You can ask him if that refreshes his recollection.

A I don't know. It is about ten years ago.

Q At the time of the trial, Mr. Nathan, did you look at the indictment?

A I wasn't too familiar with the indictment, no, sir.

Q Did you ever look at the indictment, is my question.

A I was really -- I did not really understand the question.

Q Did you look at the indictment, is my question.

A Did I look at it?

1 bbbr 27 Nathan-cross

2 THE COURT: Yes.

3 A I suppose I did. I suppose I did. Yes, sir.
4 I must have looked at it.

5 Q Did you ever conclude that the indictment was
6 two or three years in error on when you filed those tax
7 returns?

8 THE COURT: I sustain the objection.

9 MR. THAL: I object.

10 A I don't even understand the question.

11 THE COURT: I sustained the objection.

12 THE WITNESS: Thanks a lot, sir. Thank you,
13 sir.

14 Q Did you ever tell Mr. Bender that you wanted
15 to call any other witnesses besides Mr. Katzman?

16 A I did.

17 Q And who did you tell Mr. Bender you wanted
18 to call?

19 A I wanted to call Teddy Mate.

20 Q What did you think Mr. Mate would say that would
21 help your case?

22 A Mr. Mate had spoken to Sandy Katz. Mr. Mate
23 would have confirmed Sandy Katz' testimony that Joseph Katzman
24 was in complete charge after Sandy Katz confessed to the
25 government that he had made errors in my account.

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Nathan-cross

2 MR. THAL: Your Honor, I am just going to
3 make a statement for the record.

4 THE COURT: Please don't make a statement. Are
5 you objecting?

6 MR. THAL: Yes. It is an objection. It is
7 the extent the layman, the client, can draw legal conclusions,
8 I am allowing him to answer, but I think it should be
9 understood he is not a lawyer.

10 THE COURT: That's fair enough.

11 MR. THAL: And he should not be asked for
12 legal --

13 THE COURT: Of course not. The question is
14 merely what he thought Mr. Mate would add if he were
15 called upon to testify.

16 A I believe he would be very beneficial.

17 MR. WOHL: I object to Mr. Thal's statement
18 after he puts the witness on the stand who talks about what
19 his main witness is going to be, and then to stand up in
20 middle of testimony and make that objection, I think is
21 quite improper.

22 THE COURT: You may think it is improper, but
23 I think the point is that Mr. Nathan is not to give legal
24 conclusions, but indicate why he thought the fellow would be
25 helpful to him. That's all.

29

Nathan-cross

THE WITNESS: Absolutely.

Q Did Mr. Mate participate in the filing of any of your tax returns upon which you were indicated?

A No, sir.

Q And you say then that Mr. Mate would have in effect testified that Mr. Katz had told him, that is Mr. Mate, the same thing that Mr. Katz was testifying to from the witness stand at a earlier time. Is that it?

A He also would have told him how Katz had handled the books, and that one of the reasons I hired Teddy Mate was to straighten out the mess that the books were in, and that he definitely would have shown how Sandy Katz had operated my business, operated the accounting part of my business.

Q Now, did you ever talk to Mr. Bender about the subject of whether or not you should testify?

A I did.

Q Who made the decision, Mr. Nathan, as to whether or not you would testify as a witness in your own defense?

A I kept screaming I wanted to testify, but Mr. Bender kept threatening me and putting me down.

Q How did Mr. Bender -- withdrawn.

Despite what you kept screaming about, did you

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Nathan-cross

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2 ever change your mind and come to the conclusion that you
3 should not testify?

4 A If I would have known that Joseph Katzman had
5 involved another client and was wanted on a collusive deal,
6 and that Lou Bender had represented him, I definitely
7 wouldn't have continued with Lou Bender because to my way
8 of thinking, this was -- here I had a accountant, Joseph
9 Katzman, that involved another client in a collusive deal,
10 and the government was after him for collusiveness, and my
11 own attorney -- this is a million to one shot -- that my
12 own attorney had represented him.

13 Q Are you finished, Mr. Nathan?

14 A Yes.

15 Q My question is did there come a time when you
16 changed your mind about testifying, and you yourself
17 concluded that you should not testify in your own defense?

18 A No, sir.

19 Q Did you ever tell Mr. Bender at any time that
20 you agreed with his judgment that you should not testify?

21 A No, sir.
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1 bb 1 Nathan-Cross

2 Q Did you receive advice from anyone else
3 other than Mr. Bender on the question of whether you
4 should testify?

5 A No, sir.

6 Q Did you receive any advice from Judge
7 Baltimore on that subject?

8 A No, sir.

9 Q Did Mr. Bender's associate, Sandor
10 Frankel, say anything to you about whether or not
11 you should testify?

12 A As far as Sandy Frankel was concerned,
13 I don't know why he wasn't at the counsel's seat.
14 I had retained him, and it was understood with
15 Mr. Bender that he would be there, but I never
16 saw Sandy Frankel.

17 Many times I saw him in the office in the
18 morning, and I asked him why he wasn't in court,
19 and he said, "I will be there later," but he never
20 showed up.

21 Q Did you ever discuss your case in
22 Mr. Bender's office with Sandy Frankel, Mr. Bender's
23 associate?

24 A No, sir.

25 Q You never had any discussions with

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Nathan-Cross

2 Mr. Frankel, is that it? Concerning your case
3 I mean.

4 A He might have been there sometimes when
5 I was with Mr. Bender, but I do not recall what
6 the nature of the conversation was, no, sir.

7 Q And it is your testimony then that Mr.
8 Bender never said to you that you were the one
9 who had to make the decision as to whether or not
10 you were going to testify?

11 A Absolutely not. If he would have said
12 that, I would have been on the stand. I do not run
13 away from everything.

14 THE COURT: You answered the question.

15 Q It is your testimony that when the
16 conflict of interest question was first raised in --

17 I'll withdraw that for a minute.

18 Did you talk to Judge Baltimore about the
19 fact that you wanted to testify?

20 A He knew I wanted to testify.

21 Q Did you talk to him about it?

22 THE COURT: The question is did you talk
23 to him about it.

24 A Everybody knew I wanted to testify.
25 Anybody that would ever speak to me would know

1 bb 3 Nathan-Cross

2 that I wanted to testify. I went to the Grand Jury
3 by myself. I went to every prosecutor myself.
4 Why shouldn't I testify at my own trial?

5 Q Did you talk to Judge Baltimore about
6 your desire to testify?

7 THE COURT: If you recall.

8 A He knew I wanted to testify. I don't
9 know whether we had specific -- Everybody knew
10 I wanted to testify.

11 THE COURT: The question is did you talk
12 if you recall -- Did you talk to Judge Baltimore
13 about your desire to testify.

14 A Let me word it the way the judge says
15 then. I don't recall. I don't know whether I
16 had the specific discussion with him. Go ahead.

17 Q At about the time that the decision
18 was made that you would not testify, did you go
19 to Judge Baltimore and say, "Look, I want to
20 testify, but Lou Bender won't let me"?

21 A Excuse me, I was under an apprehension
22 that Joseph Katzman was not involved in any trouble
23 with the IRS.

24 THE COURT: Try to answer the question.
25 Please, Mr. Nathan. Please try to answer the question.

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Nathan - Cross

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A Go ahead. I'm sorry, sir.

Q At or about the time that the decision was made that you would not testify in your own defense, did you go to Judge Baltimore and say, "I want to testify in my own defense, but Lou Bender won't let me," or words to that effect?

A Judge Baltimore was not with us all the time.

THE COURT: Just -- Whether you recall saying that to Judge Baltimore.

A I don't recall saying that.

Q What did you think Judge Baltimore's function in this trial was?

A Just as a friend.

Q You knew him to be a criminal court judge, didn't you?

A Yes. He was a friend. I knew him about 20 years. A very honorable man, an attorney, and I just wanted somebody sort of -- I had never been in a criminal court before, and I just wanted somebody to sort of lean on, to have somebody with me.

He was very seldom there. I knew it at the time because he sits at different times in

1 bb 4 Nathan - Cross

2 New Rochelle, and I knew he would not be there.

3 During the trial he had gone to Boston. He was seldom
4 there.

5 Q When the conflict of interest question first
6 arose, you are telling us that the substance of Mr. Bender's
7 communication to you was that he represented another client
8 of Mr. Katzman, not that he actually represented Mr.
9 Katzman. Is that right?

10 THE COURT: Wait a minute. I don't understand
11 the question.

12 MR. THAL: Objection to the form.

13 Q My question is this, Mr. Nathan: Is it your
14 testimony that when Mr. Bender first discussed this conflict
15 of interest problem with you in his office, that the
16 gist of what Mr. Bender told you was that he, Mr. Bender,
17 represented another accounting client of Mr. Katzman rather
18 than representing Mr. Katzman himself?

19 A I did not know that Mr. Katzman was involved
20 personally. That's right, sir, and I asked -- I kept
21 asking Mr. Bender, and he kept saying attorney relationship,
22 and he refused to tell me, just like he did on the stand
23 today.

24 He absolutely refused to tell me.

25 Q Do you agree with my statement that that is

1 bb 5

Nathan-Cross

2 what Mr. Bender told you?

3 A That is right.

4 Q You were present in court when this matter
5 was discussed with Judge Bonsal?

6 A I did not hear the question. I was permanently
7 what?

8 Q You were present in court?

9 A Yes.

10 Q When this matter was discussed with Judge
11 Bonsal in the robing room at the trial. Is that right?

12 A That is right.

13 Q At that time did you understand what Mr.
14 Bender was saying?

15 A Partially. Partially.

16 Q You did not really understand it. Is that
17 your testimony?

18 A I did not understand the whole thing. No,
19 sir, I did not. I was still of the opinion that Mr. Katzman
20 was not involved especially with the IRS, and that he had
21 involved another client with difficulties like I'm involved,
22 and I am involved now.

23 Q Well, were you asked this question, and did you
24 give this answer:

25 "THE COURT: I can understand that too, but

1 bb 6

Nathan-Cross

2 the point is totally apart from your reliance on Mr. Bender,
3 and Mr. Baltimore, I want to ask you do you understand the
4 situation.

5 "THE DEFENDANT:" -- That is you, Mr. Nathan -- "I
6 do."

7 A That is right.

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2 Q Now, was that a true answer or not?

3 A It was an answer based on the fact that
4 Mr. Katzman was not involved in any situation, and I
5 answered that because I asked Mr. Bender himself, "Well,
6 what should I do now?"

7 He said, well, I am not involved. That is
8 after he was asked for a refund, and he sold me the bill
9 of goods, really, that he was not involved. If I had
10 thought that Joseph Katzman was involved with a collusive
11 deal with another client, I surely would not be sold any bill
12 of goods.

13 Q I am asking you whether the answer you gave
14 to Judge Bonsal in Court was a true answer?

15 MR. THAL: I think he has answered that very
16 completely.

17 THE COURT: I think he answered it.

18 Q Now, at the time of that conference did you
19 understand Mr. Bender to be saying he was the attorney for
20 Mr. Katzman in another situation?

21 A No, sir.

22 Q Do you recall Mr. Bender saying:

23 "There are two problems. One is, Mr. Nathan's
24 right under the Sixth Amendment to counsel. The second
25 problem that you face as a result of that Sixth Amendment,

1 mmbr 2 Nathan-cross
2 is my representation of Joseph Katzman, which antedates my
3 being retained by Mr. Nathan, in a totally unrelated matter."

4 THE COURT: I don't understand what you just
5 said now. I really don't. Would you repeat it slowly and
6 explain it.

7 MR. THAL: Was there a question?

8 THE WITNESS: You are quoting some law?

9 THE COURT: Wait a minute, gentlemen.

10 He is asking you whether you recall that
11 statement having been made during the trial? During that
12 trial?

13 THE WITNESS: During the trial?

14 THE COURT: Well, outside of the hearing of the
15 jury.

16 THE WITNESS: Would you repeat the statement,
17 please.

18 MR. WOHL: Here, I will let you look at it.
19 I am showing the witness what has been marked Page 174.
20 It is the underlined portion.

21 MR. THAL: If I may help --

22 THE COURT: The reporter can't hear three
23 people talking at one time.

24 THE WITNESS: Show it to my counsel first
25 and then let him bring it over to me. Would you show it

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Nathan-cross

2 to him and let him explain it to me and I will be glad to
3 answer it.

4 MR. THAL: We are willing to stipulate to the
5 transcript and its correctness, and if Mr. Wohl has a
6 specific question to ask Mr. Nathan, it might help if he
7 phrases it properly.

8 THE COURT: You stipulate that Mr. Bender made
9 that statement?

10 MR. THAL: We will stipulate the transcript
11 is correct and these are the statements.

12 Q Do you remember that statement being made?

13 A Is this what you have reference to?

14 THE COURT: You need not do that. Counsel has
15 stipulated, as I understand, that those statements were
16 made.

17 Q Let me ask you this, Mr. Nathan: At the end
18 of that conference before Judge Bonsal, did you understand
19 at that point that Mr. Nathan -- well, excuse me -- that
20 Mr. Bender was saying that he was the attorney for Mr. Katz-
21 man in another unrelated situation?

22 A No, sir.

23 Q When did you come to learn that for the first
24 time, Mr. Nathan?

25 A I don't recall just when. Right after, a long

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Nathan-cross

1 time after my conviction. I kept asking Mr. Bender why
2 he never called Mr. Katzman, and at one time on the way to
3 court -- this must happen later -- I don't recall just
4 when -- he did mention to me that Mr. Katzman might perjure
5 himself, and I did say to him, "Well, if he does perjure
6 himself, put him on the stand and tear him apart."
7

8 Mr. Bender told me that Joseph Katzman might
9 perjure himself, and I distinctly remember saying to Lou
10 Bender, "Well, put him on the stand and tear him apart
11 if you think he is going to perjure himself."

12 Q What subject did Mr. Bender say Mr. Katzman
13 might perjure himself?

14 A I didn't ask him what subject.

15 Q What else did Mr. Bender say about Mr. Katzman?

16 A That is all he said. That was after, when I
17 kept insisting, I wanted him to be put on the stand.

18 Q Was this after the trial that Mr. Bender said
19 that to you?

20 A I just don't recall when he did say it to me.

21 Q If you had testified as a witness in your own
22 defense, Mr. Nathan, one of the things you were going to
23 do, you were going to call Allen Edwards, the accountant
24 who testified for the government, a liar? Right?

25 A That is absolutely true, and he did lie, because

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Nathan-cross

2 he said everything he testified to was on record, and I had
3 the privilege of locating -- I didn't know where Allen
4 Edwards was -- and I finally located him, and he told me
5 the same thing.

6 Q Is it your claim that Mr. Edwards' testimony
7 is false in the fact that Mr. Edwards was saying it was all
8 on record and you are saying some of it was not on record?

9 MR.THAL: Objection on the relevancy of this
10 line.

11 THE COURT: I think I will sustain that objection.
12 The point is you say if you testified you would call him
13 a liar?

14 THE WITNESS: I sure would have.

15 Q In any event, the gist of it would have been --

16 MR.THAL: I object.

17 THE COURT: Well, I don't see what the gist of
18 it has to do.

19 MR.WOHL: We would get over this more rapidly
20 if he answers the questions. My question is simply this --

21 Q Wouldn't you have claimed, as you testified,
22 that Mr. Edwards was not being truthful when he said as
23 a witness that--

24 THE COURT: Well, I am going to sustain the
25 objection.

1 mabr 6

Nathan-cross

2 You say if you had testified you would have
3 called Edwards a liar?

4 THE WITNESS: I sure would.

5 THE COURT: Do you recall what you would have
6 said he was a liar about?

7 THE WITNESS: Surely.

8 No. 1, he never told me anything about any
9 supposed errors in my bookkeeping; he never said anything like
10 that; he was more interested in the investments. He
11 wanted to save me money, invest in tax incentives, and oil
12 leases and capital. I was not interested in anything like
13 that; I wanted him to take care of my books, and we had a
14 distinct argumen- and I got rid of him.

15 THE COURT: Yes.

16 I have something else to take care of. How
17 much longer is this going to be? I know Judge Baltimore
18 is around. I suppose he is to testify. I have to start
19 a trial tomorrow morning at 9 o'clock, and it is a trial of
20 some length, and I am just wondering how much longer you
21 people will be here today.

22 How much have you got on your cross here?

23 MR. WOHL: I would say no more than probably
24 fifteen minutes, your Honor.

25 THE COURT: I think I will take a short recess,

1 mmbr 7

Nathan-cross

2 and I would like you to think about it. I understand that
3 Judge Baltimore is going to be called?

4 MR. THAL: I have only ten or twelve questions
5 of him. I think I have another five or ten minutes at
6 most.

7 THE COURT: I think we ought to take a five-
8 minute recess.

9 See if we can shorten this up. If I don't
10 finish it today, I don't know when I can put it on again.

11 THE WITNESS: I appreciate it, sir.

12 Thank you, sir.

13 (Recess.)

14 BY MR. WOHL:

15 Q In any event, you agree, do you not, that
16 you ultimately discharged Mr. Edwards as your accountant?

17 A I did.

18 Q Prior to Mr. Edwards, you also had another
19 accountant named Isadore Dunst? Isn't that right?

20 A He is deceased.

21 THE COURT: The question is whether you had
22 him.

23 THE WITNESS: Yes.

24 Q You knew that he had died shortly before the
25 trial?

1 numbr 8

Nathan-cross

2 A I found out. I don't know how shortly before
3 the trial. That is true.

4 Q And isn't it a fact that Mr. Dunst had also
5 brought to your attention the very same problem in your
6 bookkeeping that Allen Edwards told you was improper?

7 MR. THAL: Objection. I don't see the rele-
8 vancy.

9 THE COURT: He can answer if he recalls.

10 A It is not true, but I don't recall.

11 Q Which is it? You don't recall or ti is not
12 true?

13 A Both. I don't recall.

14 THE COURT: You don't recall?

15 THE WITNESS: I don't recall.

16 MR. WOHL: May we have this marked as Government's
17 Exhibit 3 for identification, please.

18 (Government's Exhibit 3 was marked for
19 identification.)

20 MR. THAL: I ask --

21 MR. WOHL: I object to a speech in front of the
22 witness.

23 MR. THAL: I have an objection to this line
24 of questions. I will not discuss this document. May I
25 make the objection?

1 mmbr 9

Nathan-cross

2 THE COURT: No. Go ahead. We are wasting
3 time.

4 Q I ask you to look at Government's Exhibit 3,
5 Mr. Nathan. I ask you to read it. Then my question is
6 going to be whether it refreshes your recollection on this
7 subject.

8 A What is the date of this?

9 THE COURT: Wait a minute. Refresh his
10 recollection about what?

11 MR. WOHL: His conversations with Mr. Dunst.

12 MR. THAL: Objection.

13 THE COURT: Please.

14 THE WITNESS: This is not conversation with
15 Mr. Dunst.

16 THE COURT: He wants to know whether reading
17 that document refreshes your recollection as to whether
18 you had a conversation with Mr. Dunst. You can say it does
19 or it does not.

20 THE WITNESS: It does not.

21 Q You didn't even read it.

22 A My eyes bother me. Let me counsel read
23 it. Since my operation my eyes are bad.

24 MR. WOHL: No more questions.

25 THE COURT: Do you have any questions,

1 mmbr 10 Nathan-cross-redirect

2 Mr. Thal?

3 REDIRECT EXAMINATION

4 BY MR. THAL:

5 Q Did you believe that Mr. Katzman's testimony
6 would have helped you if he had been called as a witness?

7 A Definitely.

8 MR. WOHL: Objection. Asked and answered.

9 THE COURT: He has already answered that.

10 THE WITNESS: Definitely.

11 Q Did you hire Mr. Katzman to arrange for
12 or supervise the Internal Revenue Service audit that was
13 going on at that time?

14 A I did.

15 MR. WOHL: Objection. Leading.

16 THE COURT: It is a leading question, I must
17 confess, and I don't know which audit you are talking about.
18 Did you hire Mr. Katzman for what--

19 Q For the audit that was going on for your firm?
20 I didn't phrase it that way.

21 MR. WOHL: I object. It is leading, in any
22 event. He should ask why he hired him.

23 THE COURT: There is no jury. I don't know what
24 audits you are talking about. I don't think that Mr.
25 Nathan does. What audit?

1 mmbr 11

Nathan-redirect

2 Q Was there at the end of 1968 or at the end
3 of 1969 and early 1970, was there an on-going audit for
4 Nathan, Nathan & Nathan Limited?

5 A Yes.

6 Q Did you retain Mr. Joseph Katzman to supervise
7 the audit?

8 THE COURT: Did you retain Mr. Katzman in
9 connection with this audit?

10 THE WITNESS: I did.

11 Q Was it your view that he was in charge of this
12 audit?

13 MR. WOHL: Objection. Leading.

14 THE COURT: I sustain the objection.

15 MR. THAL: I have nothing further.

16 THE COURT: Thank you, Mr. Nathan.

17 THE WITNESS: Thank you, sir. I appreciate
18 it.

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Baltimore-direct

2 R I C H A R D L. B A L T I M O R E, J R., a witness
3 called on behalf of the Petitioner, being first
4 duly sworn, testified as follows:

5 DIRECT EXAMINATION

6 BY MR. THAL:

7 Q Are you presently a member of the judiciary
8 of the State of New York?

9 A Yes.

10 Q Can you tell us in what position?

11 A Acting City Judge, City of New Rochelle,
12 New York.

13 Q At the time of the trial in U.S. v. Nathan did
14 hold the same position?

15 A I did.

16 Q Are you also a practicing attorney at this
17 time?

18 A I am.

19 Q Were you also a practicing attorney at the time
20 of the trial of U.S. v. Nathan?

21 A I was.

22 Q Did you represent Mr. Nathan at the trial in
23 U.S. v. Nathan?

24 A I did.

25 Q Can you tell us in what capacity you were pre-

1 mmbr 13 Baltimore-direct
2 sent at the trial?

3 A I was called down as a friend of Mr. Nathan's
4 and I was there part of the time.

5 THE COURT: Who called you down?

6 THE WITNESS: Mr. Nathan, and I had to get
7 the permission of the presiding judge of the Ninth Judicial
8 Conference in order to appear. I could not be attorney
9 of record.

10 Q Did you get such permission?

11 A Yes.

12 Q Was it a limited permission?

13 A It was limited.

14 Q Could you tell us how it was limited?

15 A It was limited in that it could not interfere
16 with my other obligations; I could not be attorney of record;
17 I could not be trial counsel.

18 Q Was Mr. Bender aware of these limitations?

19 A He was.

20 Q Did you advise him?

21 A I did.

22 Q Did you participate in pretrial conferences,
23 strategy conferences with Mr. Bender and Mr. Nathan?

24 A Not strategy. I was present the night before
25 trial and on one or two other occasions. I had nothing to

1 mnmbr 14

Baltimore-direct

2 do with the strategy of the trial.

3 Q The one or two other occasions, sir, were
4 before the night of the first day of trial or after?

5 A I believe it was after.

6 Q You had no meetings with Mr. Nathan or
7 Mr. Bender the night before the trial?

8 A There may have been one.

9 Q When would approximately that have been?

10 A Shortly before the trial.

11 Q When was the first time that you learned that
12 there might be a conflict of interest on the part of
13 Mr. Bender?

14 A The night before the trial.

15 Q Are you absolutely certain of that?

16 A Absolutely certain.

17 Q Can you recall and tell us what the discussions
18 were that evening, what Mr. Bender said and what else was
19 said? Who was present at that meeting?

20 A Mr. Nathan was present. I don't know whether
21 Mr. Frankel, I think his name is, was present or not.
22 Mr. Bender and I were there. Mr. Bender told me there
23 was a possible conflict because the IRS met with Mr.
24 Katzman, who was supervising accountant for Mr. Nathan, and
25 that the government called Mr. Katzman, that he could not

1 mmbr 15 Baltimore-direct
2 cross examine Mr. Katzman, and that he wanted me to do
3 it, would I attend a conference the next morning, because
4 he wanted to bring it to Judge Bonsal's attention, and
5 I said I would, and I did.

6 Q Did you understand the nature of the conflict?

7 A Yes. I understand that it was a client of
8 Mr. Katzman's who had something similar with Internal
9 Revenue Service, but Mr. Bender gave me no more information
10 than that, and, of course, I could not ask him because
11 it as a matter of his client and I was not going to go into
12 that.

13 Q At any time that evening or prior to the
14 conference before Judge Bonsal the next day, were you apprised
15 of the fact that Mr. Bender actually represented Mr. Katzman
16 himself?

17 A Definitely not, because if I had known that
18 I would have made certain strong recommendations both to
19 Mr. Nathan and to Mr. Bender.

20 Q Did Mr. Bender advise you or Mr. Nathan in your
21 presence on that evening meeting that you should agree
22 to whatever was said in the conference before Judge Bonsal?

23 A I don't follow that question.

24 THE COURT: Yes, I don't, either.

25 Q Did he instruct you or Mr. Nathan in your

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Baltimore-direct

presence to just say yes or in any way to just agree on the record to any proposals that were made?

A Oh, no, no one would tell me to agree to anything to say yes to.

THE COURT: The answer is no?

THE WITNESS: I am sorry, the answer is no.

Q Did you understand throughout the conference before Judge Bonsal on, I believe, the first day of trial that Mr. Nathan was being asked to waive all of his Sixth Amendment rights?

A I recall no such discussion at all.

Q You do recall the decision in which you participated together with Judge Bonsal and Mr. Bender?

A Yes, I recall that.

Q You recall the substance of that or would you need to refresh your recollection?

A I would need to refresh my recollection.

MR. THAL: I show him that portion of the transcript.

THE COURT: I suggest you might mark that as a plaintiff's exhibit.

(Petitioner's Exhibit A was marked for identification.)

Q I show you a portion of the transcript

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Baltimore-direct

1 of the trial in U.S. v. Nathan. Please look at it and see
2 if it refreshes your recollection as to the conference before
3 Judge Baonsal.
4

5 A Yes, I recall this.

6 Q Did you understand during this conference that
7 Mr. Nathan would be asked to waive his Sixth Amendment
8 rights as to counsel by Mr. Bender at the trial?

9 MR. WOHL: Objection.

10 THE COURT: I think I would sustain an ob-
11 jection as to the form of that question.

12 Q At that conference could you tell us what
13 your standing was of the waiver that was being asked for?

14 MR.WOHL: Objection.

15 THE COURT: I think I will let the witness
16 answer that question.

17 Was there a waiver?

18 THE WITNESS: Yes, Mr. Nathan was waiving his right
19 to have other counsel.

20 Q That is how you understood it?

21 A Yes.

22 Q Could you explain to me what you mean by other
23 counsel?

24 A Well, there was a question whether Mr. Bender,
25 who was Mr. Nathan's attorney, would possibly have to

1 mmbr 18 Baltimore-direct

2 disqualify himself. I can't tell you what Mr. Nathan
3 thought; I can't read his mind. But Mr. Nathan was asked
4 a question and Mr. Nathan answered, "Anything the lawyer
5 says is all right with me."

6 A Will you repeat that question.

7 Q You now believe you had at that time suf-
8 ficient facts --

9 THE COURT: I sustain the objection to that
10 question.

11 I think you have answered it, Judge Baltimore.
12 I think you have indicated that having read this, your
13 understanding was that Mr. Nathan waived his right to have
14 another lawyer.

15 THE WITNESS: That is correct.

16 THE COURT: In connection with his trial
17 on the basis of what was said.

18 THE WITNESS: Yes, Mr. Nathan said, "I have
19 complete confidence in the lawyers."

20 Q Did Mr. Nathan have all of the facts on which
21 to make that decision?

22 THE COURT: I sustain that.

23 Q You testified before, Judge Baltimore, that on
24 the evening before this conference you were advised, together
25 with Mr. Nathan, that Mr. Bender represented a client of

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Baltimore-direct

2 Mr. Katzman?

3 A That was my understanding. That is correct.

4 Q Was that still your understanding of the
5 facts at the time of this conference the next morning?

6 A I think in the conference the next morning --
7 you see, I don't recall juyt what Mr. Bender said. Mr.
8 Bender told the Court something. I don't recall exactly
9 what he said, unless I read it. Mr. Bender said,
10 "I have spoken to Mr. Katzman yesterday and I asked him if he
11 has any objection to my still representing Mr. Nathan,"
12 but there was nothing in there that went into the relation-
13 ship between Mr. Katzman and Mr. Bender at the time.

14 Q Are you then telling me that you still were
15 clear during the course of that conference what the conflict
16 was? What the problem was?

17 MR. WOHL: Objection.

18 THE COURT: I think I will sustain the ob-
19 jection.

20 MR. THAL: Can I ask what the basis of the
21 objection is?

22 THE COURT: You gave Judge Baltimore that exhibit
23 to read and you asked questions on the basis of that,
24 and I think the transcript speaks for itself .

25 MR. THAL: I am trying to establish what

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Baltimore-direct

his understanding was at the time of the conference.
That is what I have been trying to establish. He told
us what he learned the night before. I am trying to find
out what he understood throughout that conference.

THE COURT: All right. Go ahead.

Judge Baltimore, did you understand?

THE WITNESS: In that conference Mr. Bender
made a passing reference that Mr. Katzman was a client
of his, but I did not understand that Mr. Bender was repre-
senting Mr. Katzman in any matter which involved
Mr. Katzman in an Internal Revenue Service matter or
criminal investigation. I still thought that Mr. Katzman
had a client who was involved with the government.

Q Did you discuss this with Mr. Nathan after
the conference? Did you discuss your understanding of
the matter with Mr. Nathan after the conference?

A Yes, I did.

THE COURT: Let me ask you, Mr. Baltimore,
one question -- I don't know what page you got -- my page says
174.

THE WITNESS: Yes, there is a 174 here.

THE COURT: Down at the bottom of that page,
this is Mr. Bender talking.

THE WITNESS: Yes.

1 mmbr 21

Baltimore-direct

2 THE COURT: Read that statement there.
3 Don't read it out loud. Just read it to yourself, at
4 the bottom of that page and the top of the nextpage.

5 THE WITNESS: I just read that.

6 THE COURT: Would that give you the impression
7 that Mr. Bender had represented Mr. Katzman?

8 WITNESS: It would.

9 THE COURT: I think that is right. That
10 is the point I am getting at. That does give you that
11 impression and that came out at the time.

12 Q Do you think that that was a full and complete
13 disclosure of the conflict problem?

14 MR. WOHL: Objection.

15 THE COURT: I sustain the objection as to
16 that.

17 Q Did you ever learn from Mr. Bender that he
18 was representing Mr. Katzman in a criminal case?

19 A No, I did not.

20 Q Could you estimate for us approximately how
21 many days of trial you were present at?

22 A About 40 percent of the time.

23 Q Did you ever learn of your own first-hand
24 knowledge that Mr. Nathan wanted to take the witness stand
25 in his own defense?

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A I did.

Q How did that come about?

A Mr. Nathan so stated.

Q On more than one occasion?

A He did.

Q Did he state it very definitely?

A He did.

Q Did there ever come a time when he said he did not want to take the witness stand?

A Not in my presence. He may have. I don't know.

Q He never said it to you?

A He never told me that.

Q Did you ever learn from first-hand knowledge that Mr. Nathan wanted to have Mr. Ted Mate called as a witness in his own defense?

A I did.

Q Did Mr. Nathan state that to you?

A He did.

Q Do you know if Mr. Bender was aware of that?

A I believe he was, but I am not going to be positive of some of the conversations. I will not state categorically that Mr. Bender was present. I think he was.

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Baltimore-direct

2 THE COURT: You can't recall?

3 THE WITNESS: I can't recall that with
4 certainty.

5 Q Do you know whether Mr. Bender ever advised
6 Mr. Nathan against taking the witness stand?

7 THE COURT: In your presence?

8 A Yes, he did.

9 Q Did Mr. Nathan request a medical adjournment
10 from Mr. Bender, if you know?

11 A He did.

12 Q Was the basis of that adjournment a recent
13 eye operation?

14 MR. WOHL: Objection as leading.

15 THE COURT: Yes.

16 Q Did Mr. Nathan's eye condition --

17 THE COURT: Wait a minute. Be careful
18 about all these leading questions.

19 MR. THAL: I am thinking of the time of the
20 court.

21 THE COURT: You don't have to.

22 Q What was Mr. Nathan's physical condition
23 during the the trial?

24 A He was holding his eye and holding it down,
25 and several times he asked Mr. Bender to get an adjourn-

1 nmbr 24

Baltimore-direct

2 ment because of his condition. I advised Mr. Nathan
3 to try to hold his head up, because the jury might think
4 he was faking.

5 Q Do you believe that could have had influence
6 on the jury?

7 MR. WOHL: Objection.

8 THE COURT: I sustain the objection to that.

9 Q Who made the legal strategy decisions
10 throughout the course of Mr. Nathan's case?

11 A I had nothing to do with strategy.

12 THE COURT: The question is, who did?

13 THE WITNESS: So far as I know --

14 MR. WOHL: I object to the question. It
15 is vague; we don't know what decisions he is talking about.

16 THE COURT: Yes. I think it is quite clear,
17 I think Judge Baltimore has stated that he didn't have
18 anything to do with strategy decisions and that they were
19 Mr. Bender's decisions.

20 THE WITNESS: Yes.

21 Q Did Mr. Bender represent to you that there
22 was any conflict which might impair his ability to represent
23 Mr. Nathan?

24 A No.

25 MR. THAL: Thank you.

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Baltimore-cross

CROSS EXAMINATION

BY MR. WOHL:

Q Judge Baltimore, did Mr. Bender ever tell you that there was any conflict that would impair his ability to represent Mr. Nathan?

A No.

Q Did you ever express an opinion to Mr. Bender as to whether or not you thought Mr. Nathan would make a good witness in his own defense?

A I did.

Q What was that opinion?

A I told him that I thought Mr. Nathan would not make a good witness even when he is telling the truth.

Q Did you explain to Mr. Bender why you thought that?

A Yes, because Mr. Nathan is easily excited, very easily excited, and Mr. Nathan, I also told Mr. Bender, tells the truth, and he assumes that everyone is going to believe him, and anyone of that character makes a poor witness.

Q Do you recall the period of time the government had rested and Mr. Bender announced to the Court something to the effect that the defense was going to make a decision as to whether or not any witnesses would

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Baltimore-cross

2 be called?

3 A I doubt I was present then. I was not present.

4 THE COURT: You don't recall?

5 THE WITNESS: I don't recall that I was present.

6 Q Were you consulted at about the time the final
7 decision was made as to whether or not Mr. Nathan should
8 testify?

9 A So far as I know, not at the time of final
0 decision; I was consulted earlier, but at the time the
1 decision was made I don't think I was even in the city.

2 Q When was it that you were consulted?

3 A The first couple of days of trial.

4 Q Who was present when you were consulted?

5 A I can't answer that.

6 Q Were these discussions in person or over the
7 telephone?

8 A In person.

9 Q And who was it who consulted you?

10 A Mr. Bender and Mr. Nathan and I discussed
11 it. Mr. Sandor Frankel may or maynot have been present.

12 Q At the time did you express an opinion that
13 Mr. Nathan would make a poor witness, as you described
14 earlier?

15 A I did.

Q Did you ever change your opinion?

A No.

Q Were there any discussions when you were present on the subject of who was going to make the final decision of whether Mr. Nathan would testify or not?

A I don't recall that.

Q When did you learn for the first time that Mr. Nathan was not going to appear as a witness in his own defense?

A I don't know. As I said before, at the time that the people rested and the defense went on, I was not even in the city. I don't know anything about that.

Q Were you present on the day of the summations?

A No, I was not.

Q Did you ever appear at a trial after the government rested?

A I don't know.

THE COURT: You don't recall?

THE WITNESS: I don't recall.

Q Did you talk to Mr. Nathan over the telephone during this period at all?

A I probably did.

Q Do you recall any discussion on the decision that he would not testify as a witness?

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Baltimore-cross

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2 A I don't recall that. But I want to correct
3 one thing. I do recall that I was present one time when
4 something came up about a juror. That is the only time
5 I can recall after the people rested.

6 Q This was a problem where a juror's husband
7 was complaining about the juror not being home, or something
8 like that?

9 A I don't know the details of it. I know there
0 was a question about a juror, some question about a juror,
1 and I don't recall the details of it because I was not
2 consulted about the details. I do recall that, which
3 means I was here once after the people rested.

4 Q Was that after the jury was out deliberating?

5 A Yes.

6 Q At that time you were then waiting with Mr.
7 Nathan and Mr. Bender for the verdict? Is that right?

8 A That is correct.

9 Q Did you have any discussions at that time with
0 Mr. Nathan about how the trial had gone?

1 MR. THAL: Objection.

2 THE COURT: I sustain the objection to that.

3 Q Did you have any discussions with Mr. Nathan
4 about the fact that Mr. Nathan had not testified as a
5 witness in his own defense?

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Baltimore-cross

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A I recall no such conversation.

Q You don't recall, then, at that time Mr. Nathan coming up to you and saying something to the effect that he wanted to testify in his own defense, but Mr. Bender would not allow him to testify, or something to that effect?

A Mr. Nathan said quite often he wanted to testify in his own defense, but I can't pinpoint the particular time that he said it. He said it quite often.

Q Do you recall whether he said it at this time when the jury was out?

A Probably did. He said it almost every time I talked with him.

Q Was it your understanding that the final decision as to whether or not a defendant should testify on his own behalf should be made by the defendant or his lawyer?

A As a matter of law it should be made by the defendant; as a matter of practice it is generally made by the lawyer.

Q When you say it is generally made by the lawyer, do you mean that the lawyer advises the defendant what he thinks is the best course, and the defendant ordinarily goes along with it.

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Baltimore-cross

2 A The defendant generally has to either go along
3 or get another lawyer.

4 Q So I guess you are telling us that if
5 Mr. Nathan had come to you while the jury was out deliber-
6 ating and said that he very much --

7 MR. THAL: Objection.

8 THE COURT: As I understand the question so
9 far, I am going to sustain the objection. I don't see
10 that it makes much difference during the jury deliberation.
11 The only thing that strikes me, you thought prior to the
12 government resting, knowing that Mr. Nathan wanted to
13 testify, you did indicate you didn't think it wise that
14 Mr. Nathan testify?

15 A Yes.

16 Q When Mr. Bender for the first time raised this
17 possible conflict of interest problem, Judge Baltimore,
18 was it over in Mr. Bender's office or somewhere else?

19 A It was in Mr. Bender's office.

20 Q At that time was there any statement by you
21 in substance that Mr. Bender should return to Mr. Nathan
22 the fee that Mr. Nathan had paid Mr. Bender?

23 A I never discussed the fee; I didn't know what
24 it was; I had no discussion about the fee.

25 Q At the time of this trial did you know that

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Baltimore-cross

2 Mr. Bender had a reputation in New York as a criminal
3 tax lawyer?

4 A I did.

5 Q He was well known as a very good criminal tax
6 lawyer?

7 MR. THAL: Objection.

8 A He even gave lectures on that.

9 THE COURT: I think that answers the question.

10 THE WITNESS: Yes, he lectured on it. He has
11 a reputation for being a good tax lawyer.

12 Q When was it that you heard for the first
13 time the suggestion that you cross examination Mr. Katzman?

14 A The night before trial in Mr. Bender's office.

15 Q Did you agree to cross examine Mr. Katzman?

16 A I did upon the basis of going before Judge
17 Bonsal and asking his permission. I insisted we had
18 to bring it to his attention at that point.

19 Q And that is what happened the following
20 morning? Is that correct?

21 A That is correct.

22 Q After that meeting before Judge Bonsal,
23 the colloquy before Judge Bonsal, was it your expectation
24 that if Mr. Katzman did testify as a government witness
25 that you would cross examine him?

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Baltimore-cross

1 A That is correct.

2 Q Judge Baltimore, at the time of the conference
3 with Judge Bonsal on the conflict of interest question,
4 did you think that what Mr. Bender told Judge Bonsal about
5 this potential conflict of interest was materially different
6 from what he had told you in his office the day before?

7 A Yes, there was a difference, definitely was.

8 Q You realized it at that time?

9 A I did.

10 Q Did you bring that to Mr. Bender's attention?

11 A I did not, because unless Mr. Katzman took
12 the stand it became immaterial.

13 Q Did you bring it to Mr. Nathan's attention?

14 A I did not. I brought it to no one's at-
15 tention, as I said, if Mr. Katzman took the stand I had
16 certain things in mind to do, unless he took the stand,
17 it became immaterial.

18 Q I suppose it was also your view that since
19 the arrangement had been made you would conduct a cross
20 examination, in any event, even if he did take the stand,
21 it was immaterial, this difference?

22 A No, if he took the stand I would have
23 recommended to Mr. Bender certain possible things which
24 might have resulted in a mistrial, because if he took the
25

mmbr 33

Baltimore-cross

stand and if I knew Mr. Katzman had been a client of Mr. Bender's, I had certain things I was going to recommend, and I was going to speak to Judge Bonsal about it in open court, but it never materialized. In other words, I was not going to be in a position once I found out that Mr. Katzman was a client of Mr. Bender's, of cross examining without having information that the government had and investigation would disclose, otherwise, I would have n basis upon which to cross examine Katzman.

Q In other words, you intended then to independently make sure that all of the appropriate materials to conduct a full and complete cross examination of Katzman?

A That is absolutely correct.

Q And that was your intention in the event he took the witness stand?

MR. WOHL: I have no further questions.

THE COURT: Any further questions?

MR. THAL: Just a few, your Honor.

REDIRECT EXAMINATION

BY MR. THAL:

Q Did you understand during the conference before Judge Baonsal that more than just the cross examination of Joseph Katzman was at issue?

mmbr 34

Baltimore-redirect

1
2 A That was the only thing I was concerned with at
3 the time.

4 Q Did you understand that the conflict of interest
5 that Mr. Bender was raising before Judge Bonsal might
6 affect other decisions that were being made at the trial
7 or would be made at the trial?

8 A I had my own opinion. There was no discussion
9 of it.

10 Q What was your opinion?

11 A The instant I found out that Bender represented
12 Katzman, then the conflict of interest was in my mind,
13 and if Katzman took the stand, I intended to bring out to
14 the jury that Katzman could not properly represent Mr. Nathan
15 in his negotiations with the Internal Revenue Service if
16 he was under any cloud, but I did not know that before
17 these discussions, that Katzman was the client Mr. Bender
18 spoke of.

19 Q Did you understand that Bender's concern
20 with Katzman being called as a witness had anything to do
21 with whether or not Mr. Nathan took the stand?

22 A That just never came up.

23 RECROSS EXAMINATION

24 BY MR. WOHL:

25 Q Are you saying that one of the areas of

1 expected cross examination of Mr. Katzman, that Katzman
2 might have been trying to help himself in his own problems
3 by testifying for the government against Mr. Nathan?
4

5 A When I first found out that Katzman himself
6 was the person who was under suspicion -- I don't know whether
7 it was criminal or just Intelligence -- at that point
8 that was the first thing that occurred to me.

9 MR.WOHL: Thank you. No further
10 questions.

11 (Witness excused.)

12 THE COURT: Are you resting as far as the
13 testimony?

14 MR. WOHL: Yes.

15 THE COURT: Is the government resting?

16 MR.WOHL: Yes.

17 THE COURT: Gentlemen, I think what I would like
18 you to do is for each side to prepare a post-hearing
19 brief. It is going to be short. You don't need to
20 repeat the things you had in the prior brief. I would
21 like a very brief post hearing brief on what you think the
22 testimony has brought out in relation to the issues involved
23 in the proceeding and I would like it with references to
24 the transcript. I would like you to do that just as soon as
25 you can.

1
2 MR. WOHL: To some extent the schedule will
3 be determined by when we can get the transcript.

4 THE COURT: I hope we can get the transcript
5 just as soon as possible, and I should think a fair time
6 would be three days after you get the transcript. Would
7 that be fair?

8 MR. THAL: That is fine with me, your Honor.

9 THE COURT: Is that all right with the govern-
10 ment?

11 MR. WOHL: I would think that the appropriate
12 thing for the government is to receive the plaintiff's
13 and then respond to the plaintiff's.

14 THE COURT: I think that is probably fair, and
15 if Mr. Thal can serve the government, say, within three
16 days after you get the trasncript post-trial, I will give
17 the government about three days hence.

18 MR. WOHL: That is agreeable.

19 MR. THAL: That is agreeable.

20 THE COURT: Thank you very much.

21 - - -
22
23
24
25

GOVERNMENT'S POST-HEARING MEMORANDUM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -x

JACK NATHAN

-v-

UNITED STATES OF AMERICA

:

:

: 76 Civ. 4451 (DBB)

:

----- -x

GOVERNMENT'S POST-HEARING
MEMORANDUM

ARGUMENT

I. Nathan Waived Any Conflict of
Interest of His Counsel

Nathan failed at the hearing to develop any convincing evidence to vitiate his in-court waiver of any conflict of interest arising out of his attorney's representation of both Nathan and Joseph Katzman. The trial record is clear that Mr. Bender explained on the record that Katzman was his client (Tr. 96) and that although at that time the government had "no intention" of

GOVERNMENT'S POST-HEARING MEMORANDUM
of calling Katzman, if it did call him in
rebuttal, a conflict of interest could be
created. Mr. Bender specifically referred to
his inability to cross-examine his own client
and the "divided loyalty" problem now stressed
on this petition. (Tr. 95-96)*

Nathan obviously preferred to go ahead
with Mr. Bender rather than seek other counsel
and an adjournment:**

"Your Honor, I have complete
confidence in Mr. Bender and
Judge Baltimore. Whatever they
do, I am one hundred percent
in accord." (Tr. 97).

Nathan, the owner of several corporations
as well as a seat on the New York Produce Exchange
(Tr. 337, 345), then told the Court that he under-
stood the situation and that he waived any right he
may have to object to Mr. Bender's potential conflict

* "Tr." refers to pages of the trial transcript
in United States v. Nathan, 74 Cr. 377. "H" refers
to pages of the hearing held on December 1, 1976
in Nathan v. United States, 76 Civ. 4451.

** The implication in Nathan's testimony that he
did not know how to go about obtaining replacement
counsel (H.70), conflicts with the fact that Nathan
had previously been represented in this matter by
Jules Ritholtz and then Jay Goldberg, both well
known criminal defense lawyers. (H. 78-79)

GOVERNMENT'S POST-HEARING MEMORANDUM

of interest. (Tr. 98).

The primary purpose of Nathan's \$2255 petition is to squirm out of this waiver by now claiming in direct conflict with the trial transcript, that he did not understand the waiver (H.96) and that Mr. Bender took unfair advantage of him. (H.70). The Court should reject most of Nathan's testimony on being unworthy of belief. Nathan's suggestion that Mr. Bender improperly pressured him into accepting the conflict (H. 70-71) is supported by no other testimony since Nathan's counsel chose not to ask either Mr. Bender or Judge Baltimore about it; and Nathan's claim that Judge Baltimore commented to Mr. Bender that he would have to return Nathan's fee was, again, not put to Mr. Bender, and was flatly contradicted by Judge Baltimore. (H. 127). In assessing Nathan's credibility the Court should also take into account Nathan's obvious motive and his repeated attempts at the hearing to avoid res-

GOVERNMENT'S POST-HEARING MEMORANDUM

ponding directly to questions. (H. 77, 86, 90, 92-94, 98).

II. Nathan Demonstrated No Prejudice
From the Alleged Conflict of
Interest.

The proof at the hearing clearly showed that Nathan suffered no prejudice from the potential conflict of interest of which he now complains.

Nathan's primary complaint is that he did not testify in his own defense. The testimony at the hearing clearly established that the decision not to testify was made by Nathan (H.52), and that Mr. Bender's advice that Nathan not testify was based on Mr. Bender's strategic evaluation of the case solely from Nathan's point of view (H. 46-50) without consideration of any effect on Katzman (H. 29, 31, 36). Indeed, Judge Baltimore agreed that Nathan should not testify (H. 46, 122) and Nathan's appearance at the hearing confirmed both lawyers' conclusions that Nathan would make a poor witness. Besides Nathan's demeanor, Mr. Bender advised Nathan not to testify because he feared cross-

GOVERNMENT'S POST-HEARING MEMORANDUM

examination on Nathan's claim that he was the victim of a vendetta by an Internal Revenue agent; a matter concerning Nathan's bookkeeper, Beatrice Carrasquillo, which even at this stage Nathan seeks to avoid disclosing (H. 48, 50) and also about how Nathan's corporation changed from a tax status of a Subchapter S corporation to a regular corporate status for tax purposes. (H. 47). While Nathan has no response to the first two of these considerations which moved Mr. Bender to advise him against taking the stand, he seizes on the third to claim that it prompted Mr. Bender to act out of loyalty to Katzman, not Nathan, because according to Nathan, Katzman caused his books to be backdated in connection with the change in corporate status. Nathan's claim on this point is wholly without substance. First, it is obvious that Nathan would not benefit from having the jury exposed to yet another area of fraudulent tax activity in connection with his affairs even along with Nathan's attempts to blame it on yet another accountant, this time Katzman, in the same fashion as he had attributed his other misdeeds to Edwards and Katz. In addition, any story by Nathan that the documents allowing the change of status

GOVERNMENT'S POST-HEARING MEMORANDUM

were somehow falsely created by Katzman would have been inconsistent with Nathan's statement to the Internal Revenue Service on October 10, 1972 to the effect that the relevant transfer of shares had in fact occurred and was known to Katz. (See Exhibit 1 (annexed hereto). Finally, Nathan's claim that Mr. Bender was motivated by a desire to protect Katzman from any disclosure is a possible motive as which was/apparent to Nathan at the time of trial as it is now.

Nathan also claims that Mr. Bender failed to call defense witnesses. Nathan failed, however, to link the failure to call defense witnesses to any conflict of interest (H. 57, 61), or to come up with any convincing evidence which anyone could have offered in his defense. Nathan's claim that Katzman could have "confirmed" what Katz testified to (H.80-81) of course, entirely misses the point because Katzman would not have been allowed to testify to any statements by Katz which were mere repetitions of what Katz said on the witness stand. In addition, Katzman could

GOVERNMENT'S POST-HEARING MEMORANDUM

have done nothing to exculpate Nathan on matters relating to the tax returns upon which Counts One and Two were based and which Nathan filed before he ever met Katzman. (H. 83). Finally, the government theory of Nathan's guilt on Counts Three and Four omitted the outstanding checks, the only matter which Nathan claims Katzman was involved in, and relied only on the cashed checks which Katzman had nothing to do with. (H. 81, 84) (See GX-340).

Nathan's claim that other witnesses should have been called has even less substance (H. 37), confirming Mr. Bender's testimony that at the appropriate time for the defense to proceed, he knew of no witnesses who could be called who would advance Nathan's case. (H. 56-57).

The hearing revealed Nathan's claim to be nothing more than a last ditch effort, after all other defenses had failed, to blame his con-

GOVERNMENT'S POST-HEARING MEMORANDUM

viction on his attorney, just as he had previously sought to blame his tax crimes on his accountants.

CONCLUSION

Nathan's petition should be rejected.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York
Attorney for the United
States of America.

FRANK H. WOHL
Assistant United States Attorney
Of Counsel

ORDER AND DECISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

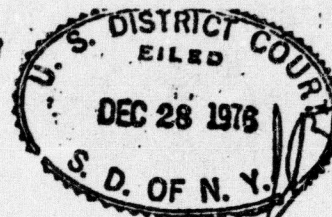
----- X
JACK NATHAN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.
----- X



76 Civ. 4451

MEMORANDUM

BONSAL, D. J.

Petitioner Jack Nathan moves pursuant to 28 U.S.C. §2255 to have his conviction vacated on the ground that he was denied the effective assistance of counsel, by reason of his counsel's conflict of interest and that his counsel did not allow him to testify at trial although he wanted to do so. An evidentiary hearing was held on December 1, 1976.

Petitioner was convicted on October 9, 1975 of four counts of tax evasion following a jury trial, and was sentenced on December 8, 1975, to concurrent terms of nine months imprisonment and fines of \$10,000 on each count. His conviction was affirmed on appeal, 536 F.2d 988, and certiorari was denied, 45 U.S.L.W. 3323 (U.S. Nov. 1, 1976).

At his trial petitioner was represented by Louis Bander whom he had privately retained. Also present at petitioner's side

MICROFILM

DEC 29 1976

ORDER AND DECISION

throughout much of the trial was Judge Richard L. Baltimore, a friend of petitioner. Both Mr. Bender and Judge Baltimore testified at the hearing.

Petitioner alleges a conflict of interest by reason of Mr. Bender's representation of Joseph Katzman, who was employed by petitioner and who was under investigation in an unrelated matter by the Internal Revenue Service. This matter was brought to the court's attention on the first day of trial. The record clearly indicates that after Mr. Bender had disclosed his representation of Mr. Katzman to the court in the presence of petitioner, the following colloquy took place:

THE COURT: But the point is, totally apart from your reliance on Mr. Bender and Mr. Baltimore, I want to ask you do you understand the situation?

THE DEFENDANT: I do.

THE COURT: Regardless of your reliance on them do you waive any right that you may have, is that correct?

THE DEFENDANT: Yes, your honor. [Tr. hph 78.]

Although petitioner now claims that he did not understand the full extent of the conflict, the court concludes that he made a knowing waiver at that time.

Moreover, petitioner has failed to establish a real conflict or a specific instance of actual prejudice. United States v. Carrigan, Docket Nos. 74-2056, -2057 (2d Cir. November 3, 1976); United States v. Mari, 526 F.2d 117, 119 (2d Cir. 1975); United

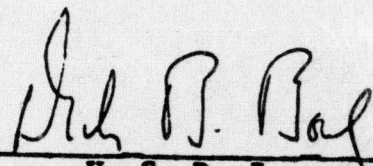
ORDER AND DECISION

States v. Lovano, 420 F.2d 769, 773 (2d Cir.), cert. denied, 397 U.S. 1071 (1970). The Subchapter S matter, relating to responsibility for the backdating of corporate papers, was collateral to any of the charges on which petitioner was being tried. As for the decision that petitioner not testify, Judge Baltimore testified at the hearing that he agreed with Mr. Bender at the time of trial that petitioner would make an extremely poor witness; petitioner's testimony at the hearing satisfies the court that this was a wise decision. Finally, with respect to calling other defense witnesses, nothing was brought forth at the hearing to indicate that the testimony of other witnesses would have been relevant to the issues at trial or helpful to petitioner's defense.

For the foregoing reasons, petitioner's motion for relief pursuant to §2255 is denied.

It is so ordered.

Dated: New York, N.Y.
December 28, 1976


U. S. D. J.

Service of ^{Two 2} ~~three~~ (3) copies, of
the within is
hereby admitted this
of , 197

Attorney for USA

